

San Francisco Law Library

No. 76619

Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

1069
No. 2815

United States 1069
Circuit Court of Appeals
For the Ninth Circuit.

The AMERICAN BANK OF ALASKA, a corporation,

Plaintiff in Error,

vs.

G. JOHNSON, as Trustee in Bankruptcy in the
Matter of T. MITCHELL & CO., a mining co-
partnership consisting of THOMAS MITCHELL,
JAS. J. FALLON, and HERMAN FAWCETT,
Bankrupts,

Defendant in Error,

Transcript of Record.

Upon Writ of Error from United States District Court
for the Territory of Alaska,
Fourth Division.

Filed

JUN 15 1916

F. D. Monckton,

Clerk.

LP

G

U

No. _____

United States
Circuit Court of Appeals
For the Ninth Circuit.

The AMERICAN BANK OF ALASKA, a corporation,
Plaintiff in Error,

vs.

G. JOHNSON, as Trustee in Bankruptcy in the
Matter of T. MITCHELL & CO., a mining co-
partnership consisting of THOMAS MITCHELL,
JAS. J. FALLON, and HERMAN FAWCETT,
Bankrupts,

Defendant in Error,

Transcript of Record.

Upon Writ of Error from United States District Court
for the Territory of Alaska,
Fourth Division.

Due service and receipt of three copies hereof ad-
mitted this.....day of....., 1916.

.....

.....

Attorneys for Defendant in Error.

INDEX

	Page
Amended Complaint	4
Answer to Amended Complaint	11
Assignment of Errors	215
Bill of Exceptions	19
Citation on Writ of Error	254
Clerk's Certificate to Transcript of Record....	261
Demurrer to Amended Complaint	10
Designation of Place of Hearing on Writ of Error	258
EXHIBITS:	
Plaintiffs' Exhibit "A"	21
Plaintiffs' Exhibit "B"	26
Plaintiffs' Exhibit "C"	28
Plaintiffs' Exhibit "D"	39
Plaintiffs' Exhibit "E"	20
Plaintiffs' Exhibit "F"	41
Plaintiffs' Exhibit "G"	45
Plaintiffs' Exhibit "G-1"	47
Plaintiffs' Exhibit "I"	87
Plaintiffs' Exhibit "J"	93
Plaintiffs' Exhibit "K"	95
Plaintiffs' Exhibit "L"	97
Plaintiffs' Exhibit "M"	166 A-B
Defendants' Exhibit "1"	77
Defendants' Exhibit "2"	111
Defendants' Exhibit "3"	112
Instructions by the Court to Jury	173

Index	Page
Judgment	207
Motion for Judgment Notwithstanding Verdict.	195
Motion for New Trial	197
Order Overruling Demurrer to Amended Complaint	11
Objection to Entry of Judgment in Favor of Plaintiff	203
Order Allowing Writ of Error and Fixing Supersedeas Bond	249
Order Relative to Supersedeas Bond on Writ of Error	250
Order Settling and Allowing Supplemental Bill of Exceptions	213
Order Extending Time of Docketing and Entering Writ of Error	259
Order Settling and Allowing Bill of Exceptions	206
Petition for Writ of Error	248
Praecipe for Transcript	2
Reply	17
Supplemental Answer of Defendant	16
Supersedeas Bond on Writ of Error	256
Supplemental Bill of Exceptions	211
Stipulation Relative to Printing Record	1
Special Verdict	191
TESTIMONY IN BEHALF OF PLAINTIFF:	
Brown, John K.	84
Recalled	94
Carlson, Matthew O.	85
Recalled	105

Index	Page
Fallon, James J.	49
Cross-examination	72
Redirect examination	81
Recalled	105
In Rebuttal	169
Cross-examination in Rebuttal	171
Fawcett, Herman	99
Johnson, George	19
Liongavich, Tony	101
Pratt, Harry E.	102
Cross-examination	104
TESTIMONY IN BEHALF OF DEFENDANT:	
Bruning, A.	107
Cross-examination	122
Redirect Examination	169
Verdict	190
Writ of Error	252

Names and Addresses of Attorneys of Record.

JOHN KNOX BROWN, THOS. A. McGOWAN,
JOHN A. CLARK, and McGOWAN & CLARK,
Attorneys for Defendant and Plaintiff in Error,
Fairbanks, Alaska.

THOMAS A. MARQUAM and LOUIS K. PRATT,
Attorneys for Plaintiff and Defendant in Error,
Fairbanks, Alaska.

In the United States District Court for the Territory
of Alaska, Fourth Division.

No. 2011.

G. JOHNSON, as Trustee in Bankruptcy in the Mat-
ter of T. Mitchell & Co., a mining copartnership
consisting of Thomas Mitchell, Jas. J. Fallon, and
Herman Fawcett, Bankrupts,

Plaintiff,

vs.

THE AMERICAN BANK OF ALASKA, a corpor-
ation,

Defendant.

Stipulation Relative to Printing of Record.

It is hereby stipulated that, in printing the papers
and records to be used on the hearing on writ of
error in the above entitled cause, for the consideration
of the United States Circuit Court of Appeals for the
Ninth Circuit, the title of the Court and cause in full
on all papers shall be omitted, except on the first

page of said record, and that there shall be inserted, in place of said title, in all papers used as a part of said record, the words "Title of Court and Cause"; also, that all indorsements on all papers used as a part of said record shall be omitted, except the clerk's filing marks and the admission of service.

Dated at Fairbanks, Alaska, on this twelfth day of April, A. D. one thousand nine hundred sixteen.

THOMAS A. MARQUAM,
LOUIS K. PRATT,

Attorneys for Plaintiff.

JOHN K. BROWN,
McGOWAN & CLARK,

Attorneys for Defendant.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. Apr. 12, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

Praeceptum for Transcript.

To J. E. Clark, Clerk of the above-entitled Court:

You will please prepare transcript of the record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, upon the writ of error heretofore perfected to said Court, and will include in said transcript the following documents, papers, and records, to-wit:

1. Amended complaint.
2. Demurrer to amended complaint.
3. Minute order overruling demurrer to amended

complaint.

4. Answer of defendant.
5. Supplemental answer of defendant.
6. Reply of plaintiff.
7. Bill of exceptions and order allowing and settling same.
8. Judgment.
9. Supplemental bill of exceptions and order allowing and settling same.
10. Assignment of error.
11. Petition for writ of error.
12. Order allowing writ of error and fixing supersedeas bond.
- 12a. Order relative to supersedeas bond on writ of error.
13. Writ of error.
14. Citation on writ of error.
15. Undertaking on writ of error and supersedeas with order approving same.
16. Designation of place for hearing writ of error.
17. Order extending time of docketing and entering writ of error with Clerk of Circuit Court of Appeals.
18. Stipulation relative to printing record.
19. Praeceptum for transcript.

This transcript to be prepared as required by law and the orders and rules of this Court and of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the

Ninth Circuit, at San Francisco, California, on or before the thirty-first day of July, A. D. one thousand nine hundred sixteen, pursuant to the order of this Court extending time.

Dated at Fairbanks, Alaska, on this fourteenth day of April, A. D. one thousand nine hundred sixteen.

JOHN K. BROWN

McGOWAN & CLARK

Attorneys for Plaintiff in Error.

Due service of the foregoing praecipe for transcript and receipt of a copy thereof acknowledged this 14th day of April, A. D. 1916.

T. A. MARQUAM

LOUIS K. PRATT

Attorneys for Defendant in Error.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. Apr. 14, 1916." J. E. Clark, Clerk, by L. F. Protzman, Deputy.")

[Title of Court and Cause.]

Amended Complaint.

Comes now the plaintiff above named and by leave of court first had and obtained, files this his amended complaint in the above entitled cause and alleges:

I.

That T. Mitchell & Co. were, on the thirty-first day of September, a mining co-partnership, composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, and were, on the 30 day of September, 1913, by the above entitled court, adjudged to be bankrupts

upon petition of creditors of said T. Mitchell and Co., and that the proceedings in bankruptcy were duly referred to W. H. Adams, referee in bankruptcy, residing in Fairbanks, Fourth Judicial Division, Territory of Alaska, and that said bankruptcy proceedings are still pending in the bankruptcy court of said referee.

II.

That thereafter and prior to the commencement of this action, such proceedings were had before said referee, that plaintiff was duly and regularly, by said referee, appointed trustee in bankruptcy in said bankruptcy proceedings, and that the plaintiff is now the duly appointed, qualified and acting trustee in bankruptcy, and as such trustee is entitled to the possession of all of the estate of said T. Mitchell & Co.

III.

That the defendant is a corporation duly organized and existing under the laws of the State of Washington; that its principal place of business is at the town of Fairbanks, Fourth Judicial Division, Territory of Alaska.

IV.

That within four months prior to the date of said order of adjudication, adjudging said T. Mitchell & Co. bankrupts, to-wit, on the thirty-first day of July, 1913, the said firm of T. Mitchell & Co. delivered into the possession of the defendant, at their place of business in said town of Fairbanks, certain gold

dust belonging to the said Firm of T. Mitchell & Co., which said gold dust was then of the value of \$3,750.27.

V.

That at the time of the delivery of said gold dust to said defendant, as aforesaid, the said firm of T. Mitchell & Co. were indebted to said defendant in a sum greater than said sum of \$3,750.27, to-wit, in the sum of about \$4,096.04, which said indebtedness was, at the time of the delivery of said gold dust, past due.

VI.

That said defendant without any authority from said T. Mitchell & Co., or from any member of said firm, and without right, converted said gold dust and the whole thereof to its own use, and applied the value thereof, to-wit, the said sum of \$3,750.27, toward the payment of said indebtedness of \$4,096.04, which was then past due and owing from said firm of T. Mitchell & Co. to said defendant.

VII.

That said gold dust was so delivered into the possession of defendant by said T. Mitchell & Co., as above stated, with the intention on the part of said T. Mitchell & Co. of selling the same to defendant and depositing the proceeds of such sale to their credit in their general deposit account in said defendant bank, and having the same credited to their deposit account for the purpose of checking against the same to pay the wages of workmen, then work-

ing for said T. Mitchell & Co., as well as to pay the running expenses of the mining operations then conducted by said T. Mitchell & Co., and the said defendant unlawfully and without any right or permission, applied the whole value of said gold dust, to-wit, the said sum of \$3,750.27 towards the payment of said indebtedness, then past due and owing, from said T. Mitchell & Co., to defendant as above stated, and that said defendant immediately, after ascertaining the value of said gold dust, notified said T. Mitchell & Co. that it had applied the whole value of said gold dust, to-wit, the said sum of \$3,750.27 toward the payment of their past indebtedness, and then and there notified said T. Mitchell & Co. that they would not honor any checks against said amount, and that said T. Mitchell & Co. were not permitted by said defendant, at any time, to check against the same, and that at no time was the value of said gold dust, or any part thereof, placed to the deposit account of said T. Mitchell & Co. in the defendant bank, so as to entitle said T. Mitchell & Co. to check against the same, or any part thereof.

VIII.

That at the time of the delivery of said gold dust to said bank, by said bankrupts, as above stated, said bankrupts, to-wit, T. Mitchell & Co., composed of the firm of Thomas Mitchell, James J. Fallon and Herman Fawcett, were justly and lawfully indebted to different persons, in an aggregate sum far exceeding the value of the estate of said firm together with that

of, and each of, the individual members thereof, and that said firm were, and each of its members was at said time, insolvent, and the said defendant well knew, at said time, that said firm of T. Mitchell & Co. were wholly insolvent, or had reasonable cause to believe they were insolvent, and that defendant well knew at the time of receiving the said gold dust, and at the time of applying the same, or its value, to the payment of the past indebtedness then due, defendant would and did effect a preference whereby defendant would receive a larger percentage of the indebtedness due it from said bankrupts than the other creditors of the said bankrupts of the same class, and that said defendant at said time had reasonable cause to believe that the application of said gold dust, or its value to its past due indebtedness, would effect such preference, and that the same was so applied by said defendant with the purpose of procuring such preference.

IX.

That the entire value of the estate of said T. Mitchell & Co., bankrupts, is, and ever since, prior to the thirty-first day of July, 1913, was wholly together with the estate of each of the individual members thereof, insufficient to pay the lawful indebtedness of said firm, and that the retention by said defendant of said sum of \$3,750.27 would pay to defendant a much greater percentage of the indebtedness due to defendant from said T. Mitchell & Co., than would be received by any of the other creditors of the said

T. Mitchell & Co. of the same or any class.

X.

That the plaintiff prior to the commencement of this action, demanded of defendant said gold dust or said sum of \$3,750.27 the value thereof, but the said defendant refused to deliver said gold dust or to pay any portion of said sum to plaintiff.

WHEREFORE:

Plaintiff as such trustee in bankruptcy, prays judgment against defendant for the sum of \$3,750.27, together with interest thereon at the legal rate, from the thirty-first day of July, 1913, together with his costs and disbursements herein expended.

R. F. ROTH,

Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

G. Johnson, being first duly sworn, deposes and says: That he is the plaintiff as trustee in bankruptcy in the matter of the bankruptcy of T. Mitchell & Co.; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge as he verily believes.

G. JOHNSON.

Subscribed and sworn to before me this 17th day of June, 1914.

JOHN A. CLARK,

Notary Public for Alaska.

My commisison expires Apr. 24, 1918.

Service of the foregoing amended complaint admitted and a true copy thereof received this 18 day of June, 1914.

McGOWAN & CLARK,
Attorneys for Defendant.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. Jun 18, 1914. Angus McBride, Clerk, by P. R. Wagner, Deputy.

[Title of Court and Cause.]

Demurrer to Amended Complaint.

Now comes the above named defendant, the American Bank of Alaska, a corporation, by its attorneys, Messrs. McGowan & Clark and John K. Brown, and demurs to the amended complaint of the plaintiff herein, upon the ground and for the reason that said amended complaint does not state facts sufficient to constitute a cause of action.

Fairbanks, Alaska, June 22, 1914.

McGOWAN & CLARK
JOHN K. BROWN

Attorneys for Defendant.

Due service of the within demurrer and receipt of a copy thereof are hereby acknowledged this 22d day of June, 1914.

R. F. ROTH,
Attorney for Defendant.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Jun 23, 1914. Angus McBride, Clerk, by P. R. Wagner, Deputy.")

(Title of Court and Cause.)

General October 1913 Term. One hundred eighty-third court day. Monday, September 14, 1914.

Order Overruling Demurrer.

Now on this day came on for hearing defendant's demurrer to the amended complaint herein, R. F. Roth appearing in behalf of plaintiff, John K. Brown in behalf of defendant; after argument thereon by the respective attorneys, and the Court being fully and duly advised in the premises,

IT IS ORDERED that said demurrer be, and the same is, hereby overruled, and defendant allowed ten days within which to file his answer herein.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 13, page 14.

[Title of Court and Cause.]

Answer to Amended Complaint.

Now comes the above named defendant, American Bank of Alaska, by McGowan & Clark and John K. Brown, its attorneys, and for answer to the amended complaint herein:

I.

Denies each and every allegation contained in paragraph VI thereof, except that said defendant admits that on or about August 1, 1913, it set off the deposit to the credit of T. Mitchell & Co., named in said amended complaint, which deposit was on the books of said defendant in the amount of \$3,750.27,

against the past due indebtedness then due and owing from said firm of T. Mitchell & Co. to said defendant, in the sum of \$4,096.04 besides interest thereon.

II.

Answering paragraph VII thereof, admits that the gold dust mentioned in said amended complaint was delivered to the defendant by said T. Mitchell & Co., with the intention on the part of said T. Mitchell & Co. of selling same to defendant and depositing the proceeds of such sale to the credit of said T. Mitchell & Co. in its general deposit account at the bank of said defendant, and having same credited to the deposit account of said T. Mitchell & Co., and this defendant denies each and every other allegation contained in said paragraph VII.

III.

Answering paragraph VIII thereof, this defendant denies any knowledge or information sufficient to form a belief as to whether or not at the time of the delivery of said gold dust to said bank by said firm of T. Mitchell & Co., the said firm was justly and lawfully indebted to different persons, in an aggregate sum far exceeding the value of the estate of said firm, together with that of the individual members thereof; and denies any knowledge or information as to whether or not said firm was, and each of its members was at said time insolvent; and this defendant further denies each and every other

allegation contained in paragraph.

IV.

Denies each and every allegation contained in paragraph IX thereof.

For a further, separate and affirmative defense to the said amended complaint, this defendant alleges:

I.

That at the times mentioned in said amended complaint and herein mentioned, the defendant was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and engaged in carrying on a general banking business in the Town of Fairbanks, Territory of Alaska;

II.

That prior to, and some time subsequent to the first day of August, 1913, the firm of T. Mitchell & Co. was a mining copartnership, composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, engaged in carrying on a general placer mining business in the Fairbanks Mining and Recording Precinct, Fourth Judicial Division, Territory of Alaska.

III.

That on the 31st day of July, 1913, the said firm of T. Mitchell & Co. was indebted to this defendant in the sum of \$4,096.04 on account of overdrafts made by said firm of T. Mitchell & Co. upon its account with the said defendant, and on account of promissory notes theretofore executed by the said firm of T. Mitchell & Co., payable to this defendant,

which said amount of \$4,096.04 is exclusive of any interest due thereon.

IV.

That on or about July 31, 1913, the said firm of T. Mitchell & Co. sold and delivered to this defendant gold dust of the value of \$3,750.27 and directed that the said amount be placed to the credit of said firm upon the deposit books of this defendant, and this defendant thereupon on August 1, 1913, caused the said firm of T. Mitchell & Co. to be credited with said amount.

V.

That on said August 1, 1913, this defendant, with the knowledge and consent of the said firm of T. Mitchell & Co., set off against the said indebtedness of said firm of T. Mitchell & Co. to this defendant the said amount of \$3,750.27, so as aforesaid deposited to the credit of said firm of T. Mitchell & Co. from the proceeds and purchase price of the said gold dust, so as aforesaid purchased from said firm by this defendant.

VI.

That at the time of the setting off of said deposit to the credit of said firm of T. Mitchell & Co. against the amount of \$4,096.04, due and owing as aforesaid from said firm to said defendant, neither said defendant nor any of its officers knew, or had any reasonable cause to believe, that said firm of T. Mitchell & Co., or any of its members, was insolvent, and that at said time neither this defendant, nor any of

its officers, knew, or had any reasonable cause to know or believe, that the setting off of the said amount on deposit as aforesaid, to the credit of T. Mitchell & Co., against the indebtedness of said firm of T. Mitchell & Co. to this defendant would effect a preference, whereby this defendant would receive a larger percentage of the indebtedness due it from the said firm of T. Mitchell & Co. than the other creditors of said firm, of the same class, or any other class, would receive, and the said set-off was made as aforesaid, of said deposit against said indebtedness, without any purpose of securing such preference, or any other preference over and above any other creditor of said firm of T. Mitchell & Co.

WHEREFORE this defendant demands judgment that the plaintiff take nothing by his said action, and that defendant recover from plaintiff its costs and disbursements herein.

McGOWAN & CLARK

and

JOHN K. BROWN

Attorneys for Defendant.

United States of America,
Territory of Alaska,—ss.

C. J. Hurley, being first duly sworn, on oath deposes and says that he is President of American Bank of Alaska, the defendant in the above entitled action; that he has read the foregoing answer, knows the contents thereof, and the same is true as he verily believes.

C. J. HURLEY.

Subscribed and sworn to before me this October 20, 1914.

(Seal)

JOHN A. CLARK,

Notary Public for Alaska.

My commission expires Apr. 24, 1918.

Due service of the within answer and receipt of a copy thereof are hereby acknowledged this 20th day of October, 1914. R. F. Roth, Attorney for Plaintiff.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Oct. 20, 1914. Angus McBride, Clerk.")

(Title of Court and Cause.)

Supplemental Answer.

Comes now the defendant, and by leave of the Court first had and obtained, and for answer to paragraphs one and two of plaintiff's amended complaint, admits and denies as follows, to-wit:

Denies each and every matter and thing contained in paragraphs one and two of said amended complaint, save and except that defendant admits that T. Mitchell and Company, on the thirty-first day of December, A. D. one thousand nine hundred thirteen, was a mining copartnership composed of Thomas Mitchll, James J. Fallon, and Herman Fawcett.

McGOWAN & CLARK.

Attorneys for Defendant.

United States of America,
Territory of Alaska,—ss.

A. Bruning, being first duly sworn, deposes and says that he is the Cashier of American Bank of Alaska, the defendant above named,; that he has read the foregoing supplemental answer, knows the contents thereof, and verily believes the same to be true.

A. BRUNING.

Subscribed and sworn to before me on this 30th day of October, 1915.

(Seal)

JOHN A. CLARK,

Notary Public in and for the Territory of Alaska.

My commission expires 24 April, 1918.

Due service hereof admitted this Oct. 30, 1915. T. A. Marquam, Attorney for Plff.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. Oct. 30, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Reply.

Now comes the plaintiff, above named, and replies to the answer to amended complaint, on file herein, as follows:

I.

Replying to paragraph 5 of the further, separate and affirmative defense denies that defendant set off against the said indebtedness of said firm of T. Mitchell & Co. to defendant the amount of \$3,750.27, with the knowledge or consent of said firm of T.

Mitchell & Co., or with the knowledge or consent of any member of said firm of T. Mitchell & Co., on the 1st day of August, 1913, or at any other time.

II.

Denies each and every allegation contained in paragraph 6 of said further, separate and affirmative defense, and the whole thereof.

WHEREFORE plaintiff demands judgment as prayed for in his amended complaint on file herein.

R. F. ROTH,

Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

G. Johnson, being first duly sworn, on oath, deposes and says: That he has read the foregoing reply, knows the contents thereof, and the same is true as he verily believes.

G. F. JOHNSON.

Subscribed and sworn to before me this 17th day of May, 1915.

(Seal)

HARRY E. PRATT,

Notary Public in and for Alaska.

My commission expires June 24th, 1916.

Service of a copy of the within Reply admitted this 22nd day of May, 1915. McGowan & Clark, John K. Brown, Attorneys for Defendant.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Jun 2, 1915. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Bill of Exceptions.

This case came on regularly for trial before the Court, Honorable Charles E. Bunnell, Judge, presiding, at 10 o'clock, a. m., on Saturday, 30 October, 1915, Thomas A. Marquam, esq., and Louis K. Pratt, esq., appeared as attorneys for plaintiff, and Messrs. McGowan & Clark, and John K. Brown, esq., appeared as attorneys for defendant. Proceedings were taken to impanel a jury, and a jury of twelve men was accepted and sworn to try the case.

Thereafter, Mr. Marquam made an opening statement in behalf of plaintiff and Mr. Brown made an opening statement in behalf of defendant, and thereafter the trial of the case was continued from day to day until finally closed. During the trial the following proceedings were had, evidence taken, objections made, and exceptions taken:

GEORGE JOHNSON, sworn as a witness for plaintiff, testified as follows:

Direct Examination, by Mr. Marquam:

I am the plaintiff in this case as Trustee for the bankrupt firm of Mitchell & Co.

Q. When were you appointed such trustee and by whom?

(Objection. No answer given.)

Q. When were you appointed?

A. On the 16th of October, 1913.

Q. Is this your appointment from the referee of

the bankrupt? (Exhibiting paper to witness.)

A. Yes sir.

Mr. Marquam: We offer that in evidence.

Mr. Clark, for defendant, objects as no foundation has been laid, no evidence before the Court that there was ever a petition filed or proper proceedings instituted to give the Court jurisdiction, or that the bankrupts were brought before the Court, or that they were ever adjudged bankrupts, or that the referee in bankruptcy ever acquired jurisdiction or had any authority to appoint this man trustee, or that he ever qualified as such trustee, or that he is now or was at the time of the institution of this suit the duly appointed, qualified, and acting trustee of said estate.

Objection overruled.

Exc. 1.

Defendant excepts, and an exception is allowed.

(The paper is marked "Plaintiff's Exhibit E" and is as follows:

PLAINTIFF'S EXHIBIT 'E.'

In the District Court of the United States, Fourth Division, Territory of Alaska.

In the matter of T. Mitchell & Co., Bankrupts.

In Bankruptcy. Notice of appointment of trustee.
To G. F. Johnson, of Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska.

I hereby notify you that you were duly appointed Trustee of the estate of the above named bankrupts

at the first meeting of the creditors on the 16th day of October, A. D. 1913, and I have approved such appointment. The penal sum of your bond as such trustee has been fixed at One Thousand Dollars. You are required to notify me forthwith of your acceptance or rejection of the trust.

Dated: At Fairbanks, Alaska, October 16th, 1913.

W. H. ADAMS,

Referee in Bankruptcy.

(Endorsed: "No. 2011. Pltfs Exhibit E. G. Johnson Trustee Plaintiff vs. Amer Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div., Nov. 1, 1915. J. E. Clark, Clerk. by Sidney Stewart, Deputy.")

We offer in evidence the files in T. Mitchell & Co., bankrupts, No. 49-b, on file in the District Court.

(Defendant objects as too general. Objection sustained.)

Then we first introduce the creditors' petition to have the firm of T. Mitchell & Co. adjudged bankrupt.

(Defendant makes no objection. Admitted in evidence, marked "Plaintiff's Exhibit A," and is as follows:)

PLAINTIFF'S EXHIBIT 'A.'

In the District Court for the Territory of Alaska,
Fourth Judicial Division.

CREDITORS' PETITION

To the Hon. Frederic E. Fuller, Judge of the District

Court of the United States for the Fourth Judicial Division, Territory of Alaska:

The petition of R. Donaldson, of M. Kelly, of Peter Campbell, of James G. McCann and Peterson Mortenson, respectfully shows:

That T. Mitchell, J. J. Fallon and Herman Fawcett, copartners under the firm name of "T. Mitchell & Co." of Ester Creek, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, have for the greater portion of six months next preceding the date of filing this petition, had their principal place of business at said Ester Creek, and owe debts to the amount of more than one thousand (\$1,000.00) Dollars;

That your petitioners are creditors of said T. Mitchell, J. J. Fallon and Herman Fawcett, copartners under the firm name and style of T. Mitchell & Co., having proof the claims amounting in the aggregate in excess of securities held by them to the sum of more than five hundred (\$500.00) Dollars:

That the nature and amount of your petitioners' claims are as follows: The claim of R. Donaldson is for the sum of One Hundred (\$100.00) Dollars for work and labor performed for the said T. Mitchell & Co., as a placer miner on a placer mining claim on said Ester Creek; the claim of M. Kelly is for the sum of Four Hundred Four (\$404.00) Dollars for work and labor performed for said T. Mitchell & Co., on said Ester Creek; the claim of Peter Campbell

is for the sum of Ninety-nine (\$99.00) Dollars for work and labor performed as a placer miner on said Ester Creek; that the claim of James McCann is for the sum of One Hundred Eighty-two (\$182.00) Dollars for work and labor performed on placer mining claim on said Ester Creek; the claim of Peter Mortenson is for the sum of One Hundred '(\$100.00) Dollars and is for work and labor performed on placer mining claim on said Ester Creek. All of which said work and labor was performed by said creditors within the period of six months from the date hereof and was performed at the special instance and request of the said T. Mitchell & Co., and that said T. Mitchell & Co. agreed to pay to said creditors for such work and labor the sums herein claimed by each of said creditors.

And your petitioners further represent that the said T. Mitchell, J. J. Fallon and Herman Fawcett and as such firm of T. Mitchell & Co., are insolvent, and that within four months next preceding the date of this petition the said T. Mitchell, J. J. Fallon and Herman Fawcett as such firm of T. Mitchell & Co. and individually, committed an act of bankruptcy in that each of them did heretofore, to-wit: on the 21st day of August, 1913, in writing, admit their inability individually and as a partnership to pay their debts either individually or as a copartnership, and in which writing they did admit their willingness to be adjudged bankrupts on that ground, a copy of which admission, signed by said debtors, is hereunto at-

tached and made a part of this petition.

Wherefore your petitioners pray that service of this petition with a subpoena may be made upon T. Mitchell, J. J. Fallon and Herman Fawcett as provided in the Act of Congress relating to bankruptcy and that they as copartners under the firm name and style of T. Mitchell & Co., may be adjudged by the Court to be bankrupts within the purview of said acts.

MIKE KELLY,
JAMES G. McCANN,
R. DONALDSON,
P. MORTENSON,
PETER CAMPBELL.

.....
Attorney.

United States of America,
Fourth Judicial Division,
District of Alaska,—ss:

R. Donaldson, M. Kelly, Peter Campbell, James G. McCann and Peter Mortenson, being five of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true, before me 22nd August, 1913.

(SEAL)

C. E. WRIGHT,
Notary Public in and for Alaska.
Commission Exp. Oct. 15, 1913.

Fairbanks, Alaska, Aug. 21, 1913.

R. Donaldson, M. Kelly, Peter Campbell, James McCann, and Peter Mortenson, Creditors of T. Mitchell & Co.,

Gentlemen:

It is impossible for us to comply with your demand for payment of the amounts that we owe you and we, therefor, hereby admit our inability to pay our debts either as a partnership or individually, and each of the members of said partnership, together with said firm, hereby admit their inability to pay our debts and we hereby state that we are willing to be adjudged bankrupts on that ground.

Your truly,

T. MITCHELL & CO.
By JAMES J. FALLON,
THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON.

(Endorsed: "Orig. No. 49 B. In the District Court For the Territory of Alaska, Fourth Division. In the Matter of T. Mitchell & Co. Creditors' Petition in Bankruptcy, R. F. Roth, Attorney for. . . Fairbanks, Alaska." "Filed in the District Court, Territory of Alaska, 4th Div. Aug. 23, 1913, C. C. Page Clerk by C. C. Heid Deputy." "No. 2011 Pltfs Exhibit A. G. Johnson Trustee Plaintiff vs. Am. Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov. 1. 1915, J. E. Clark Clerk By Sidney Stewart Deputy.")

I now offer in evidence the adjudication.

(Defendant objects as no foundation has been laid to show that the Court acquired any jurisdiction of the parties, or had any authority to make the ad-

judication. It is an involuntary bankruptcy proceeding, and it must be shown that the parties were duly summoned to appear and all formalities of law complied with, before the Court could acquire jurisdiction of the persons or property of the estate; that a mere adjudication is nothing unless the preliminary steps had been taken. Argument; whereupon Mr. Marquam makes the following offer:)

Here is the order for the appearance. We offer that in evidence. The fact that they have appeared, and the parties are before the Court, is sufficient evidence that the Court acquired jurisdiction.

(Defendant objects to its introduction as being a paper not required by law to be signed by the Court, and it should be disregarded because it is contrary to law; the citation to appear is immaterial. Argument. Objection overuled, and said order is admitted in evidence, marked "Plaintiff's Exhibit B.", and is as follows:)

PLAINTIFF'S EXHIBIT 'B.'

In the District Court for the Territory of Alaska,
Fourth Judicial Division.

In the Matter of T. Mitchell & Co., a Mining Copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts.

No. 49-B.

Order for Appearance In Bankruptcy.

Upon considering the petition of James G. Mc-

Cann and others that Thomas Mitchell, James J. Fallon and Herman Fawcett, copartners under the name and style of T. Mitchell & Co., be declared bankrupts, it is ordered that the said T. Mitchell, James J. Fallon, Herman Fawcett do appear at this Court, as a Court of bankruptcy to be held on Saturday, the 27th day of September, 1913, at ten o'clock A. M. of said day, and show cause, if any there be, why the prayer of said petition should not be granted; and

It is further ordered that a copy of said petition, together with a writ of subpoena be served on said T. Mitchell, James J. Fallon and Herman Fawcett, by delivering the same to them personally or by leaving the same at their last usual place of abode in said District at least five days before the day aforesaid.

Dated this 20th day of September, 1913.

F. E. FULLER,

Judge of said District Court.

Entered in Court Journal No. 12, page 673.

(Endorsed: "Orig. In Bankruptcy. No. 49-B. In the District Court for the Territory of Alaska, Fourth Division. In the Matter of T. Mitchell & Co., a mining copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts. Order for Appearance. R. F. Roth Attorney for Bankrupts, Fairbanks, Alaska." Filed in the District Court Territory of Alaska, 4th Div., Sep. 20, 1913, C. C. Page Clerk, By P. R. Wagner, Deputy." "No.

2011 Pltfs Exhibit B, G. Johnson Trustee Plaintiff vs. Am Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov. 1, 1915, J. E. Clark Clerk, By Sidney Stewart, Deputy.")

Exc. 2.

(Defendant excepts, and is allowed an exception.)
I now offer the schedules.

(Defendant objects on the ground that the schedules are irrelevant, incompetent, and immaterial, no authority shown for the filing of the schedules; furthermore, the file-mark shows that they were filed before the return-day named in the order; that no jurisdiction of the persons or property had ever been acquired by the Court by the issuance of a summons and the appearance of the defendants in Court; and for the further reason that no evidence has been introduced in this Court to show that these parties have filed an appearance in this Court. Objection overruled.

Exc. 3.

Defendant excepts and is allowed an exception. Schedule marked as "Plaintiff's Exhibit C", and is as follows:)

SYNOPSIS OF PLAINTIFF'S EXHIBIT 'C.'

In the District Court for the Territory of Alaska,
Fourth Judicial Division.

In the Matter of T. Mitchell & Co., a mining co-partnership composed of Thomas Mitchell, James

J. Fallon and Herman Fawcett, Bankrupts.

No.

In Bankruptcy.

Schedule A. Statement of all Debts of Bankrupts.

Schedule A. (1). Statement of all Creditors who are to be paid in full, or to whom Priority is secured by Law:

(1) Taxes and debts due and owing to the United States None.

(2) Taxes due and owing to the district or to any county or municipality None.

(3) Wages due workmen, clerks or servants in an amount not exceeding \$300.00 each earned within three month before filing the petition:

(Here follows a list of 60 laborers, with the amounts owing to them respectively, all of which indebtedness is alleged to have been contracted by T. Mitchell & Co. between 1 April, 1913 and 31 July, 1913, for which there is no ledger reference or voucher, the aggregate amount of said claims being \$6,773.00

(4) Other debts having priority by law None

THOMAS MITCHELL,

HERMAN FAWCETT,

JAMES J. FALLON,

Debtors.

Schedule A: (2).

Creditors holding securities None.

THOMAS MITCHELL,

HERMAN FAWCETT,
JAMES J. FALLON,
Debtors.

Schedule A. (3). Creditors whose claims are unsecured.

(Here follows a list of 32 creditors, with the amounts due them set after their respective names, there being no ledger reference or voucher. All said claims are alleged to have been contracted in the year 1913 for various items other than labor, the aggregate amount of said claims being) \$7,532.75

(Among said accounts is the account of the American Bank of Alaska, set forth above in said schedule in the following words:

"No ledger reference or voucher. The creditor is American Bank of Alaska, a corporation whose residence and principal place of business is Fairbanks, Alaska. The indebtedness was contracted at Fairbanks, Alaska, in 1913, cash advanced, for the mining partnership of T. Mitchell & Co. \$345.87.")

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,
Debtors.

Referring to the item of \$345.87 due the American Bank of Alaska, as per statement of said Bank, which balance was arrived at in the following manner: On the 31st day of July, 1913, T. Mitchell & Co., owed to said Bank \$4,095.87, \$1,350.00 of which

was on four separate promissory notes: one for \$850.00, two for \$200.00 each and one for \$100.00, and the balance of \$2,745.87 upon an over-draft, and that upon the 31st day of July, 1913 said bankrupts took to said Bank gold dust of the value of \$3,750.27, and that said Bank applied said sum of \$3,750.27 in payment of their indebtedness as above stated; but did not place the same to the credit of said bankrupts so that the said bankrupts could check against the same, and that said bankrupts were not permitted to check against any part of said sum of \$3,750.27.

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,

Debtors.

Schedule A. (4) Liabilities on Notes or Bills Discounted which ought to be paid by the Drawers, Makers, Acceptors, or Indorsers.....None.

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,

Debtors.

Schedule A. (5) Accommodation Paper..None.

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,

Debtors.

Oath to Schedule A.

United States of America,
District of Alaska,—ss:

On this 3rd day of September, A. D. 1913, before me personally came Thomas Mitchell, Herman Fawcett, James J. Fallon, as members of the mining partnership of T. Mitchell & Co., the mining partnership mentioned in the foregoing Schedule, and the persons who subscribed to said schedule, and who, being by me first duly sworn, did each declare the said schedule to be a statement of all the partnership debts of said T. Mitchell & Co., in accordance with the acts of Congress relating to bankruptcy.

Subscribed and sworn to before me this 31st day of September, A. D. 1913.

(SEAL) RICHARD H. GEOGHEGAN,
Notary Public in and for Alaska.

My commission expires 24 Aug., 1914.

Schedule B. (1). Statement of All Property of Bankrupts. Real Estate.

There is no real property belonging to the firm of T. Mitchell & Co., the bankrupts herein named, and said firm did not within four months of the filing of the petition herein own any real estate of any kind or character whatever. The following described real property is owned by James J. Fallon, one of the members of said firm and one of the bankrupts herein named:

An undivided one-third interest in and to that certain placer mining claim known and described as the Olive Association on Little Eldorado Creek, a tributary of the Chatanika River in said Precinct, which association covers 4 Above Creek Claim and 4 Above

first tier, right limit, of the estimated value of \$500.00.

Placer Mining Claim No. 7 above first tier of benches, right limit on Fairbanks Creek, a tributary of Fish Creek, in said Precinct, the estimated value
\$1,500

Feb

\$1500.00

And that there are no incumbrances upon either of said mining claims.

THOMAS MITCHELL,
 HERMAN FAWCETT.
 JAMES J. FALLON,

Debtors.

Schedule B. (2). Personal Property.

All of the following described personal property situated on the Hoffman fraction, near Ester City, on Ester Creek, said Precinct; all of which is under attachment in an action brought in the Commissioner's Court, said Precinct, by Roy Rutherford vs. T. Mitchell & Co., to-wit: (of the estimated value of the amount set opposite each particular item:)

(Here follows an itemized list of certain personal property, consisting in appliances for mining, supplies, etc., under each item the value thereof being set forth, and amounting in the aggregate to) ..\$1786.00

- A. Cash on Hand.....None.
- b. Bills of exchange, promissory notes, or securities of any description.....None
- c. Stock in TradeNone
- d. Household goods and furniture, house-

- hold stores, wearing apparel and ornaments of the person, except as above statedNone
- e. Books, prints, and pictures.....None
- f. Horses, cows, sheep, and other animals..None
- g. Carriages and other vehicles.....None
- h. Farming stock and implements of husbandryNone
- i. Shipping, and shares in vessels.....None
- k. Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated (except as above stated) ..None
- l. Patents, copyrights, and trademarks.....None
- m. Goods or personal property of any other description, with the place where each is situated (except as above stated).....None

Said firm of T. Mitchell & Co., deposited with the American Bank of Alaska, on the 31st day of July, 1913, gold dust mined from said Hoffman Fraction to the value of \$3750.27, which gold dust was by the Bank applied to the indebtedness then past due from said T. Mitchell & Co., which indebtedness consisted of \$1350.00 in promissory notes and \$2745.87 in an overdraft; but no part of the proceeds of said gold dust was by said Bank placed on deposit for said T. Mitchell & Co., and was at no time subject to be checked against by said T. Mitchell & Co.,

. Total....\$1786.00

THOMAS MITCHELL,
HERMAN FAWCETT,

JAMES J. FALLON,

Debtors.

Schedule B. (3). Choses in Action

- (a) Debts due Debtors on open account...None
- (b) Stocks in incorporated companies, interest in joint companies, and negotiable bonds None
- (c) Policies of insurance.....None
- (d) Unliquidated claims of every nature, with their estimated value.....None
- (e) Deposits of money in banking institutions and elsewhere (except as above stated)..None

Total..\$ None

THOMAS MITCHELL,

HERMAN FAWCETT,

JAMES J. FALLON,

Debtors.

Schedule B. (4) Property in Reversion, Remainder, or Expectancy, including Property held in Trust for the Debtors or subject to any Power or Right to dispose of or to Charge

There is no interest in land or in personal property or property in money, stocks, shares, bonds, annuities or rights or powers or legacies or bequests, and no property that was heretofore conveyed for benefit of creditors. And there has been no sum or sums paid to counsel for services rendered or to be rendered in this bankruptcy.

Total....None

THOMAS MITCHELL,

HERMAN FAWCETT,

JAMES J. FALLON,

Debtors.

Schedule B. (5). A particular statement of the Property claimed as exempted from the operation of the acts of Congress relating to Bankruptcy, giving each item of Property and its Valuation, and if any portion of it is Real Estate, its Location, Description, and present Use.

Neither of said debtors claim any property as exempt from the operation of any of the Acts of Congress relating to Bankruptcy; or otherwise. . . . None

Total. . . . None

THOMAS MITCHELL,

HERMAN FAWCETT,

JAMES J. FALLON,

Debtors.

Schedule B. (6). Books, papers, deeds, and writings relating to bankrupts' business and estate.

The following is a true list of all books, papers, deeds, and writings relating to our trade, business, dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in our possession or under our custody and control, or which are in the possession or custody of any person in trust for us, or for our use, benefit, or advantage; and also of all others which have been heretofore, at any time, in our possession, or under our custody or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

Books. The only book of account kept by the debtors was the day book showing the transactions of the business of the firm of T. Mitchell & Co., also the time books showing the true time of the men who worked for said firm. Also receipts and bills.

Deeds, (none).....None

PapersNone

THOMAS MITCHELL,
HERMAN FAWCETT,
JAMES J. FALLON,

Debtors.

Oath to Schedule B.

United States of America,

District of Alaska,—ss:

On this 3rd day of September, A.D. 1913, before me personally came Thomas Mitchell, Herman Fawcett, James J. Fallon, as members of the mining partnership of T. Mitchell & Co., the mining partnership mentioned in the foregoing Schedule, and the persons who subscribed to said Schedule, and who, being by me first duly sworn, each did declare the said Schedule B. to be a statement of all the partnership's estate, both real and personal, in accordance with the acts of Congress relating to bankruptcy.

(SEAL) RICHARD H. GEOGHEGAN,

Notary Public in and for Alaska.

My commission expires 24 Aug. 1914.

(Then follows a summary of debts and assets taken from the Schedules A. and B., showing as debts: wages, \$6773.00; unsecured claims, \$7532.75; total

of liabilities, \$14,305.75; and showing as assets: real estate, \$1500.000; machinery, tools, etc., \$1786.00; total of assets, \$3286.00.)

Endorsed: "No. 49-B. In the District Court for the Territory of Alaska, Fourth Division. In the Matter of T. Mitchell & Co., Bankrupts. Schedules." "Filed in the District Court Territory of Alaska, 4th Div. Sep 26 1913, C. C. Page, Clerk, By P. R. Wagner, Deputy." "No. 2011. Pltfs Exhibit C., G. Johnson Trustee vs Am. Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov 1 1915 J. E. Clark, Clerk, By Sidney Stewart, Deputy.")

We now offer in evidence the adjudication that T. Mitchell & Co. are bankrupt.

(Defendant objects as no foundation has been laid; that there has been no service of subpoena; no evidence that a subpoena was ever issued; no evidence that these parties were ever brought before the Court; and no evidence that the Court ever acquired any jurisdiction to render an adjudication; for the further reason that it shows on the face of it that if that is treated as an adjudication at all, it is absolutely contrary to the provisions of section 18 of the Bankruptcy Law, which says that no adjudication shall take place until five days after the return day. There was no subpoena issued, and the only basis on which they have any return day—the law says it shall be returned within fifteen days; that under this order admitted in evidence the return day

was made in seven days. Section 18 of the Bankruptcy Law says not less than five days thereafter, if the defendants have not filed any appearance, and if the creditors have not filed an appearance or pleaded, that then the adjudication shall be made. This paper shows on its face that they did not wait five days; that this was done within three days after the seven days specified in the order for appearance, and which should have been covered by a subpoena, which it never was. The plaintiff has offered in evidence the alleged adjudication; we object further to its admission for the reason that it shows on the face of it that the copartnership of T. Mitchell & Co. were not adjudged bankrupt and have never been adjudged bankrupt.

Objection overruled.

Exc. 4.

Defendant excepts and is allowed an exception. Adjudication marked in evidence as "Plaintiff's Exhibit D", and is as follows:)

PLAINTIFF'S EXHIBIT 'D.'

In the District Court for the Territory of Alaska,
Fourth Judicial Division.

In the Matter of T. Mitchell & Co., a Mining copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts.

No. 49-B.

In Bankruptcy.

At Fairbanks, in said Division, on the 30th day of

September, A. D. 1913, before the Honorable Fredric E. Fuller, judge of the said Court in bankruptcy, the petition of James G. McCann and others that Thomas Mitchell, James J. Fallon and Herman Fawcett, co-partners under the firm name of T. Mitchell & Co., be adjudged bankrupts, within the true intent and meaning of the acts of Congress relating to bankruptcy having been heard and duly considered the said Thomas Mitchell, James J. Fallon and Herman Fawcett, co-partners doing business under the firm name and style of "T. Mitchell & Co.", are hereby declared and adjudged bankrupt accordingly.

Done in open Court this the 30th day of September, A. D. 1913.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12, page 697.

("Endorsed: "Orig. In Bankruptcy. No. 49-Bankruptcy. In the District Court for the Territory of Alaska, Fourth Division. In the Matter of T. Mitchell & Co., a Mining Copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts. Adjudication, R. F. Roth, Attorney for. . . . Fairbanks, Alaska." Filed in the District Court Territory of Alaska 4th Div. Sep 30 1913, C. C. Page, Clerk, by Angus McBride, Deputy." "No. 2011 Pltfs Exhibit D. G. Johnson, Trustee, Plaintiff vs. Am. Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div.

Nov 1 1915, J. E. Clark, Clerk, By Sidney Stewart, Deputy.”)

I now offer in evidence the order of reference.

“(Defendant objects as irrelevant, incompetent, and immaterial, no foundation laid for the offer. On the further ground that the Court had no jurisdiction to make such order, and that the record shows on its face that the Court was without jurisdiction to make the order of reference, as he did not at that time have any jurisdiction over the person of the alleged bankrupts or over the property constituting the estate of said alleged bankrupts. Objection overruled, and said order admitted and marked “Plaintiff’s Exhibit F”, and is as follows:)

PLAINTIFF’S EXHIBIT ‘F.’

In the District Court for the Territory of Alaska,
Fourth Judicial Division.

In the Matter of T. Mitchell & Co., a mining co-partnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts.

No. 49-B.

Order of Reference In Bankruptcy.

Whereas Thomas Mitchell, James J. Fallon and Herman Fawcett, copartners under the firm name and style of T. Mitchell & Co., of the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, on the 30th day of September, A. D. 1913, were duly adjudged bankrupts upon a petition filed in this Court against them on the 25 day of August, 1913,

according to the provisions of the Acts of Congress relating to bankruptcy; it is, therefore,

Ordered that said matter be referred to W. H. Adams, referee in bankruptcy of this Court to take such further proceedings therein as are required by said acts and that the said Thomas Mitchell, James J. Fallon and Herman Fawcett shall attend before said Referee on the 16th day of October, 1913, at Fairbanks, Alaska, and thence forth shall submit to such orders as may be made by said Referee or by this Court relating to said Bankruptcy.

Done in open Court this 30th day of September, A. D. 1913.

F. E. FULLER,
District Judge.

Entered in Court Journal No. 12 page 697.

(Endorsed: "Copy. No. 49 Bankruptcy. In the District Court for the Territory of Alaska, Fourth Division. In the Matter of T. Mitchell & Co., a Mining Copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts. Order of Reference. R. F. Roth, Attorney for. . . . Fairbanks, Alaska." "Filed in the District Court Territory of Alaska, 4th Div. Sep 30, 1913, C. C. Page, Clerk, By Angus McBride, Deputy." "No. 2011 Pltfs Exhibit F., G. Johnson, Trustee, Plaintiff, vs. Amer Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov 1, 1915, J. E. Clark, Clerk, By Sidney Stewart, Deputy.")

Exc. 5.

(Defendant excepts and is allowed an exception.)

We offer the papers under one cover, entitled, "Bond of Trustee"; it includes a notice of acceptance of trustee, the appointment of trustee—there are two copies—the order of the referee fixing the bond, and the undertaking of the trustee.

(Defendant objects on the following grounds: Objects to the introduction of the notice of acceptance of the trustee upon the ground that W. H. Adams, the referee in bankruptcy was entirely without jurisdiction to appoint a trustee; there had been no valid reference to him as referee in bankruptcy, and there had been no valid adjudication; and that the referee was without authority to act. Objects to the introduction of the appointment of trustee, for the reason that it shows on the face thereof that it is an attempt to appoint a trustee in a matter not before the District Court or before the referee in bankruptcy, being in a separate and distinct proceeding from any proceeding heretofore referred to in this action, and in a proceeding not properly before the Court, over which the Court had no jurisdiction; objects to the introduction of the order fixing bond, for the reason that it was beyond the power of the referee to make such an order, that it is in the matter of a bankruptcy matter that is not before the Court and has never been before the Court, and in which there has been no adjudication. Objects to the bond or undertaking offered in evidence, for the reason that it is

an undertaking wherein G. F. Johnson, the plaintiff in this action, purports to give an undertaking to the United States that he will faithfully administer the estate of Thomas Mitchell, James J. Fallon, and Herman Fawcett, bankrupts, and that the proceedings and matters before this Court are in connection with the title to certain personal property alleged to belong to T. Mitchell & Co., a copartnership, and that there is no foundation laid for the introduction of this undertaking, and it does not appear to be an undertaking such as is required by the Bankruptcy Act, that must be given by a trustee of a bankrupt estate. That this purports to be an undertaking for the administration of the estate of individuals and not of the copartnership.

Objection overruled.

Exc. 6.

Defendant excepts, and an exception is allowed. Defendant moves the Court to strike from the files in this case that portion of the exhibit termed the "undertaking", on the ground that it is irrelevant, incompetent, and immaterial, and is not and does not purport to be an undertaking given in connection with the matter of T. Mitchell & Co., bankrupts.

Motion denied.

Exc. 7.

Defendant excepts and is allowed an exception. Papers offered, admitted, and marked as "Plaintiff's Exhibit G". Plaintiff, by Mr. Marquam, asks that the undertaking be marked "G-1.". So ordered by

the Court. The said papers are as follows:

PLAINTIFF'S EXHIBIT 'G.'

In the District Court of the United States, Fourth
Division, Territory of Alaska.

In the Matter of T. Mitchell & Co., Bankrupts.

In Bankruptcy.

Notice of acceptance by trustee.

To W. H. Adams, referee in bankruptcy on said
Court:

You are hereby notified that I do hereby accept the
office of Trustee in the above entitled matter.

Dated: At Fairbanks, Alaska, October 16, 1913.

G. F. JOHNSON.

In the District Court of the United States, Fourth
Division, Territory of Alaska.

In the Matter of T. Mitchell & Co., Bankrupts.

In Bankruptcy.

Appointment of Trustee by Referee.

At Fairbanks in said district on the 16th day of
October, A. D. 1913, before W. H. Adams, referee
in bankruptcy,

This being the day appointed by the Court for the
first meeting of creditors under the said bankruptcy,
and of which due notice has been given in the Fair-
banks Daily Times, a newspaper of general circula-
tion published in said district, I, the undersigned
referee of the said Court in bankruptcy, sat at said
time and place above mentioned, pursuant to such

notice, to take the proof of debts, and for the choosing of a trustee, under the said bankruptcy.

And I do hereby certify that the creditors whose claims had been allowed, and who were present duly represented, failed to make choice of trustee of said bankrupt estate,

And, therefore, I do hereby appoint G. F. Johnson, of the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, as trustee of the same; and the creditors being then and there present whose claims had been allowed, agreed that the bond of such trustee be fixed in the sum of One Thousand dollars, which said sum of One Thousand Dollars is hereby fixed as the bond to be given by such trustee herein.

W. H. ADAMS,

Referee in Bankruptcy.

In the United States District Court for the Territory
of Alaska, Fourth Division.

In the Matter of T. Mitchell & Co., Bankrupts.

No.....

It appearing to the Court that G. F. Johnson of Fairbanks Precinct in said District has been duly appointed trustee of the estate of the above named bankrupt and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the Court and consented to by the creditors to-wit: in the sum of One Thousand Dollars, it is ordered that the said bond be, and the same is hereby approved.

Dated Fairbanks, Alaska, October 17, 1913

W. H. ADAMS,

Referee in Bankruptcy.

(Endorsements: See endorsements on Plaintiff's Exhibit 'G'.)

PLAINTIFF'S EXHIBIT 'G-1.'

In the District Court for the United States, Fourth
Division Territory of Alaska.

In the Matter of T. Mitchell & Co., Bankrupts.

In Bankruptcy.

Undertaking.

(Bond of Trustee)

KNOW ALL MEN BY THESE PRESENTS:

That we, G. F. Johnson, as principal, and Hugh McCrorie, of Fairbanks, Alaska, and Theo. Johnson of Fairbanks, Alaska, as sureties, are held and firmly bound to the United States of America in the sum of One Thousand Dollars in lawful money of the United States to be paid to said United States, for which payment well and truly to be made we bind ourselves and our heirs, executors and administrators, jointly and severally by these presents.

Signed and sealed this 16th day of October, A. D. 1913.

The condition of this obligation is such that,

Whereas, the above named G. F. Johnson was, on the 16th day of October A. D. 1913, appointed trustee in the case pending in bankruptcy in said Court wherein Thomas Mitchell, James J. Fallon and Herman Fawcett are the bankrupts, and, he, the said G.

F. Johnson has accepted said trust and all the duties and obligations pertaining thereto.

Now, therefore, if the said G. F. Johnson, trustee as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupts which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as such trustee, then this obligation to be void; otherwise to remain in full force and virtue.

G. F. JOHNSON, Principal.

HUGH McCRORIE,

THEO. JOHNSON, Surety.

Signed and sealed in the presence of:

R. M. CRAWFORD,

E. T. WOLCOTT.

United States of America,

Territory of Alaska,—ss:

Hugh McCrorie and Theo Johnson the sureties named in the foregoing bond, being first duly sworn, each for himself deposes and says: That he is a resident of the Territory of Alaska. That he is not an attorney or counsellor at law, marshal, deputy marshal, clerk of any Court or other officer of any Court. That he is worth the sum of One Thousand (\$1000) Dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

HUGH McCRORIE,

THEO. JOHNSON.

Subscribed and sworn to before me this 16th day of October, 1913.

(SEAL)

E. T. WOLCOTT,

A Notary Public for Territory of Alaska,

My commission will expire May 10, 1917.

(The originals of Plaintiff's Exhibit G and Plaintiff's Exhibit G-1 are filed under one cover, which is endorsed as follows: "No. 49-B. In the District Court for the Territory of Alaska, Fourth Division. Bankruptcy. In the Matter of T. Mitchell & Co. Bankrupts. Bond of Trustee. R. F. Roth Attorney for. . . Fairbanks, Alaska." "Filed in the District Court Territory of Alaska 4th Div. Oct 17 1913 Angus McBride Clerk By C. C. Page Deputy." "No. 2011 Pltfs Exhibit G., G. Johnson Trustee vs Amer Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov 1 1915 J. E. Clark Clerk By Sidney Stewart Deputy." "No. 2011 Pltfs Exhibit G-1 (undertaking) G. Johnson Trustee Plaintiff vs Am Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov 1 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

JAMES J. FALLON, sworn as a witness for plaintiff, testified as follows:

Direct Examination, by Mr. Marquam.

A. My name is James J. Fallon. I am the James J. Fallon mentioned in the complaint in this action and one of the copartners of the firm of Mitchell & Co. Said firm consisted of Thomas Mitchell, Her-

man Fawcett, and myself; it was formed about the 18th of January 1913, for the purpose of mining on Ester Creek, on the Hoffman Bench. The copartnership had an 85 per cent lease on that ground. We proceeded to mine in practical mining as far as I could find out. We formed an agreement between ourselves, so there would be no friction and so we would work in harmony. I was to be on the surface, in the tail race, or anywhere it happened to be that I had time to fill in. I was looking after the clerical end of it and the commissary end, and I was up around the surface as much as possible. I kept the books. I had all dealings with the merchants.

Q. What were the assets of the partnership at the time of your commencing operations?

(Defendant objects as immaterial, not within the issues in the case. Objection overruled.

Exc. 8.

Defendant excepts and exception allowed.)

A. My partners, Mr. Fawcett and Mr. Mitchell, did not have much; they had their experience to put in and their labor to put up. I was working at the time and I furnished, to about the latter part of April, the money to keep the lease going financially. That is from the 18th of January to about the middle of April. That was during the period when we were opening up. Then we had to pump water there and it cost quite a bit of money, and thereafter I had to get assistance, which the bank loaned me. During that time, all the financial assistance that the com-

pany had came from myself; the other members had nothing but their experience as miners. They were willing to do right, as a partnership should.

Q. What were the assets,—not yours individually, but belonging to the copartnership,—at the time you commenced mining operations out there? That is the three individuals as a firm, not as individuals?

A. I had about fifteen hundred dollars myself. That is all that was my individual money. I put that into the copartnership and used that money up. That was part of the copartnership assets, that or what it purchased. The copartnership owned nothing, except some mining property that I had; it did not belong to the copartnership then. The partnership owned the lease on the Hoffman bench. The partnership had no other assets, to my knowledge. They did not put anything into the enterprise. At the time the partnership was formed, my other two partners didn't have any money; I was the only one that had a little money to keep the thing going, which I did until the end of April; that was the reason I put up the money. At the time of the formation of the partnership in January 1913 I individually owned a piece of mining property .

Q. What was this property that you had at that time?

(Defendants object as immaterial. Objection overruled.

Exc. 9.

Exception taken and allowed.)

A. I had a side claim, No. Seven above on Fairbanks Creek, right limit, the Fallon Bench. I had another piece, the Owl association, a half interest in her, and Four above on the right limit of Little Eldorado. That was my personal assets. I retained that property up until the time of this bankruptcy proceeding.

Q. What became of it then?

(Defendants object as immaterial. Objection overruled.

Exc. 10.

Exception taken and allowed.)

A. That was put in the schedule.

Q. What was the value of that property on the 31st day of July, 1913, that you have just described?

(Defendant objects as witness has testified to personal property belonging to himself as an individual and not to the copartnership. The question of the solvency or insolvency of the individual members of the copartnership is not before the Court at the present time, there being no contention that the individuals have ever been adjudged bankrupt.

Objection overruled.

Exc. 11.

Defendant excepts and is allowed an exception.)

A. Well, I guess it is worth the same as it was down on the assets; a thousand for Fairbanks Creek, and five hundred for Little Eldorado.

Q. Is that all the property you had?

A. Yes sir, all.

Q. What property had your copartners at that time of the formation of the copartnership?

A. Nothing.

Q. What property had they outside of the copartnership property on the 31st day of July 1913?

A. Nothing, to my knowledge.

Q. When did you commence actual mining operations in the way of extracting gold in large quantities from the ground out of this lease or lay?

A. About the 9th of June 1913.

Q. Prior to that time what debts had you incurred, Mr. Fallon?

(Defendants objects as immaterial. Overruled.

Exc. 12.

Defendant excepts and exception is allowed.)

A. Well, probably. . . . (interrupted)

Mr. Clark: We object that it is not the best evidence if he has the books.

A. About fifteen hundred dollars.

The Court: What date was that?

Mr. Marquam: At the time they commenced the excavation of dirt and removal of it to the surface.

Q. About what date was that?

A. That was the 9th of June. That was the money that the copartnership owed me; the money that I had advanced for them. The Company owed the American Bank of Alaska at that time about \$400.00.

Q. You think that is about all the company owed at that time?

A. You talked about bills. I got machinery and one thing and another like that, and the firm owed about \$2000.00 for that on or about the 9th of June; that was for machinery, grub, and outfit; there was some little wages to be paid, too. We had the first clean-up on the third of July, it amounted to \$1904.00.

Q. What did you do with the money?

A. The money was turned into the American Bank.

Q. You had been doing business with the American Bank before that?

Yes sir.

Q. And had an account there?

A. Yes sir.

Q. After you turned it in what was done with it?

A. It was credited to us and I drew out checks for everybody,—made out checks and they were honored as far as—in fact, further than the money that was there to cover it, which made an overdraft.

Mr. Pratt: What was the exact amount?

A. Which?

Q. Of the first cleanup?

A. \$1904; that is exclusive of royalty.

Mr. Marquam: What date was that brought into the bank?

A. It was brought in on the 3rd of July—the night of the 2nd of July.

Q. Do you know how your account stood at the American Bank when you brought your first clean-

up in?

A. We owed them about \$1400.00.

Q. Was their account taken out of the proceeds of the gold dust that you brought in at that time?

A. No; the checks were all honored.

Q. The checks for what?

A. For wages, and for merchandise too; any checks that were wrote out by me for the firm were honored.

Q. So your account at the bank, after the first cleanup had been disposed of, stood just the same as it had before?

(Defendant objects as leading and suggestive.

Overruled.

Exc. 13.

Exception taken and allowed.

A. I beg pardon?

Q. I understood the effect of your testimony to be that after the disposition of the first cleanup or the proceeds thereof, your account at the bank stood the same as before the cleanup was brought in?

A. Yes, exactly.

Q. Without being reduced any?

A. No.

Q. You didn't reduce it at all?

A. No; I didn't reduce it all; I couldn't reduce it, because Mr. Hurley advanced me some more money to carry along on.

Q. Did the money that they advanced, or the checks that you issued, cover—clear up all your in-

debtedness that you were owing at that time?

A. No, sir, the money that was brought in didn't cover the checks.

Q. When did you have the second cleanup?

A. On the 16th of July.

Q. How much did you clean up at that time?

A. Twenty-two hundred and eighty dollars, exclusive of royalty.

Q. What did you do with that cleanup?

A. Brought it in and put it in the bank.

Q. What did the bank do with the gold or the proceeds thereof?

A. Well, I told Mr. Hurley—(interrupted)

Q. Never mind what you told them. What did they do?

A. It was put to our credit just the same and carried along.

Q. After it was put to your credit, what did you do with it, if anything?

A. I didn't do anything. The checks were honored.

Q. You checked against it?

A. I checked against it.

Q. And the checks were honored?

A. Yes sir.

Q. When did you have the third cleanup?

A. Supposed to have it on the 26th, but we didn't have it until the 30th.

Q. Just explain why that was Mr. Fallon.

A. Well, the water was low. We had to return

the water. The water was very muddy and it was a very dry season and everyone was up against it. And we ought to have cleaned up every ten days—that was the intention of my partner Mr. Mitchell. The 26th came along and he said: "We better wait until we get a bigger cleanup."

(Defendant objects. Objection sustained.)

Q. Don't repeat what Mitchell told you, just what was done. What was done?

A. It was postponed until the 30th.

Q. During the time between the 26th and the 30th, did the bank people, or any of its officers, make any inquiry of you as to what was going on out there?

A. Naturally they called over the 'phone.

Q. Did they do it?

A. Yes.

Q. Who called you up?

A. Mr. Bruning called me up once and wanted to know when the cleanups were coming in.

Q. What did you tell him?

A. I told him my partner postponed it until the 28th and we expected a pretty good cleanup; that he expected it would be eight thousand dollars and would cover everything.

Q. Did he ask you concerning the expected cleanup, what you thought it would amount to?

A. Yes.

Q. What did he say in that particular?

A. If I ain't mistaken, I think, to the best of my remembrance, I think that was the time he told me,

he said: "You have no money, Jim, and these notes, the overdraft here, and I have deposited something to meet your checks." That that was that five hundred dollars that he deposited to meet the checks.

Q. To reduce the overdraft?

A. To reduce the overdraft.

Q. What did he say over the 'phone with regard to inquiring whether you expected a good cleanup or otherwise? Did he make that inquiry?

A. He said: "I hope you do have a good clean-up." I think that was over the 'phone.

Q. Did you tell him what you expected to have?

A. Yes, I told him what we expected to have.

Q. What did you tell him that time over the 'phone?

A. I told him we expected to have eight thousand dollars, according to my partner; that was the reason he postponed it until the 28th.

Q. You told Mr. Bruning that you expected a cleanup on the 28th, but you postponed it until the 30th?

A. Postponed it to the 30th.

Q. Did he make any more inquiries after that until the 30th?

A. No.

Q. What was said by Mr. Bruning, if anything, about the bank cashing the next checks before the cleanup?

A. There was only one check he didn't cash, and that was, I think, about—that was the morning of

the 31st.

Q. What was the amount of that check?

A. Aleck McLean had a four hundred dollar check and he went in—¹(interrupted)

Q. And it was not cashed?

A. It was not cashed.

Q. You think that was on the 31st?

A. I think that was—It was on the 30th.

Q. So you cleaned up on the 30th of July?

A. Yes sir.

Q. How much did you clean up?

A. Well, \$3750.14, exclusive of royalty.

Q. And what did you do with the cleanup?

A. Brought it in to the bank.

Q. When?

A. The night of the 31st.

Q. About what time in the night?

A. It was between 5 and 6 o'clock.

Q. Between 5 and 6 o'clock on the 31st day of July 1913?

A. Yes sir.

Q. Now at that time what did you owe the bank in notes?

A. At that time we owed them \$1504.00.

Q. Represented by notes?

A. The notes were \$850.00 and the overdraft of \$133.00, and \$500.00 on deposit to reduce the overdraft, making it \$1504.00.

Q. I am talking about the 31st of July when you brought in your last cleanup.

A. Yes sir; we still owed the bank then.

Q. How much was your indebtedness to the bank on notes alone at that time?

A. On notes alone?

Q. About, if you don't know the exact figure?

A. About—over a thousand dollars; about one thousand and fifty dollars, exclusive of—(interrupted)

Q. How much did you say you owed them on overdraft?

A. \$133.00 was the overdraft.

Q. How much was your total indebtedness to the bank at that time?

A. \$1504.00.

Q. Wasn't your indebtedness something over \$4000.00 to the bank?

A. Oh, the total indebtedness?

Q. That is what I am asking you about; I said: notes and overdraft.

A. Yes, it was \$4800.00.

Q. Have you got any data there from which you can refresh your memory and give the exact amount?

A. I think I have. (Produces papers and book.) \$4878.82 from the 16th of July to the 31st of July. For labor they paid \$3071.50 in labor checks, and for bills, merchandise, and one thing and another, \$1804.-32. That is from the 16th of July to the 31st of July. And we owed the bank a balance of \$4096.04 on notes and overdraft. That was the total indebtedness of the firm to the American Bank on the 31st of July 1913. The indebtedness for labor on that date was \$6773.00.

Q. I will ask you, at that time, after the 31st day of July 1913, were you still an employer of labor? Did you contract any labor debts after that time?

A. None whatever. As shown by our schedule we owed other accounts, merchandise, etc, amounting to \$7532.75, exclusive of labor bills.

Now, with regard to your assets at that time, the assets of the firm of T. Mitchell & Co., your schedule shows: personal property—(interrupted)

(Defendant objects as immaterial; that if they are going to stand on the adjudication, they are bound by the adjudication. Plaintiff's attorney, Mr. Marquam, states that the adjudication that was made was that the firm was insolvent on the 25th of August 1913, and attention is now directed to a time 20 days earlier, at the time of the transaction with the bank.

Objection overruled.

Exc. 14.

Defendant excepts. Exception allowed.)

A. We had, as shown by the schedules, property in the way of mining outfit amounting to \$1786; that is the machinery and so forth on the claim on the 31st of July 1913; the assets and liabilities, as shown by the schedule, was the condition of the firm on the 31st day of July 1913. The firm had no other assets at that time.

Q. I may ask: Prior to taking this gold dust to the bank.

A. What debts we had?

Q. No, what assets, what property, did you have?

Did you have this gold dust prior to its disposition?

A. Yes, we had that gold.

Q. Very near \$3800.00?

A. I thought you meant mining property. We still had the lease at that time; it was not forfeited then. The firm had no other assets on the 31st of July 1913.

Q. What was the condition of the assets or the property of the individual members of that copartnership? Had they increased any? Had yours increased any from the time you described a while ago when you commenced mining operations and told what property you had.

(Defendant objects as irrelevant, incompetent, and immaterial. Objection overruled.

Exc. 15.

Defendant excepts. Exception allowed.)

A. I didn't make anything.

Q. Had the condition of the other members so far as property was concerned changed any during that time?

A. No.

Q. Tell the jury, when you brought that gold dust into town just what you did with it.

A. I took it into the bank. Mr. Hopkins was at the left hand side of the bank; Mr. Hopkins was tending me. Bruning was close by. I waited a second or two, and Fawcett went into the bank with me,—my partner. I left it there. We hadn't had an opportunity to blow it that day on account of a poor

fellow getting killed, and the coroner's jury was there and we didn't have a chance to blow it, so we brought it in at the gross weight. I waited to see it weighed up, and it corresponded with our weight out there, and I left it there to be blown and credited the same as before. So I left it there thinking they would attend to it later on, as soon as they got a chance. They were all busy. And a little while after that I went there—I think that was probably near eight o'clock, between seven and eight o'clock—to see if it was cleaned up yet, and it was not, and I said: 'I will call in the morning'. I went in in the morning, and—(interrupted)

Q. What time?

A. It was about twenty minutes past nine. Mr. Bruning told me—I asked for my book, etc., and I said: 'Mr. Bruning, good morning.' He said: 'Jim, I am sorry to tell you that it has been my instructions to get all the overdrafts in, and I have applied it and disbursed it'—(interrupted)

Q. Applied what?

A. The money.

Q. What money?

A. That money, I suppose. He gave me the book and the vouchers, and he said he couldn't carry me any longer.

Q. Was he referring to this money or the gold dust that you had taken in there the evening before?

A. The gold dust.

Q. Did you leave your bank book when you took

the gold dust in there?

A. I certainly did.

Q. Did he return it to you?

A. No, not that morning. Now I remember it was the next morning, the second. After he told me that, I said: 'Mr. Bruning, good gracious, I have made checks out for the men. Are you not going to try and carry us a little while longer?' He said: 'I have got to get all the overdrafts in. It is my instructions, I have got to carry them off.' Of course the notes were on demand, etc. And I said: 'Well, we are up against it then; we can't check against that dust.' Then I got the book the next morning.

Q. On the 2nd?

A. On the morning of the 2nd, the vouchers and all he returned to me.

Q. What did Mr. Bruning say to you in reponse to your statement 'Then we can't check against it'? What did he say?

A. Well, he told me that he couldn't go any further, and I asked him twice if he couldn't strain a point and go with us and carry us along a little longer, and he said he couldn't do it.

Q. He corroborated your statement to him that the result of the bank's action was that you couldn't check against it? Did he corroborate that?

A. Yes, I couldn't check against it.

Q. What time did the bank open that morning for business?

A. I couldn't say, because I immediately left there.

Q. What time does the American Bank usually open for business in the morning?

A. Ten o'clock, I suppose.

Q. Was the bank open for business at that time?

A. No.

Q. How were the blinds, up or down?

A. The blinds were up.

Q. And the door was open?

A. The door was open.

Q. And the clerks were in there?

A. Yes.

The Court: What time was that?

A. About 20 minutes past 9.

Q. What date?

A. On the morning of the 1st of August.

Mr. Marquam: About the blinds, how do you say they were?

A. They were closed, you know, the same as when they are out of business for the day.

Q. Drawn up from the bottom?

A. Yes.

Q. Or from the top down?

A. Whichever way they go.

Q. After you placed this gold dust in the American Bank did you ever check against it or withdraw any of it?

A. No, sir, I couldn't get it.

Q. You were not permitted to?

A. I couldn't get to check against it.

Q. Do you know what the condition of your accounts were so far as outstanding checks were concerned at that time that had been issued by you?

(Defendant objects as immaterial. Objection overruled.

Exc. 16.

Defendant excepts. Exception allowed.)

A. I couldn't say exactly.

Q. Was there ever any check of yours cashed, either by yourself or by any of those to whom you had issued checks, after this gold dust had been placed in the bank on the evening of July 31st?

A. No, I can tell you the amount of wages that is due.

Q. I don't care about that. I am asking you directly: Was any check cashed by the bank after you had deposited this money upon the 31st of July, 1913?

A. No, sir.

Q. Either by yourself or by anybody to whom you had issued checks?

A. None whatever, except the bank vouchers.

Q. To whom had you issued checks before this last cleanup?

(Defendant objects as witness stated that he didn't know he had any checks standing out. Mr. Marquam denies that the witness so stated. Objection overruled.

Exc. 17.

Defendant excepts. Exception allowed.)

A. What is it?

Q. To whom had you issued checks prior to this third cleanup and the time that you brought that into the bank?

A. Well, labor and merchandise.

Q. Can you give us an idea of about how many checks or the amount of the checks that you had issued between your second cleanup and your third cleanup?

(Defendant objects as immaterial. Objection overruled.

Exc. 18.

Defendant excepts. Exception allowed.)

A. There was \$3071.00 labor checks and \$1800—(interrupted)).

Q. Were those outstanding at the time you brought this last cleanup in to the bank?

A. No, sir, they were paid between the 16th and 31st.

Q. Do you know how many were not paid; that were still outstanding?

A. No, I couldn't tell you that.

Q. Do you remember whether there was a considerable amount, or otherwise?

(Defendant objects. Objection overruled.

Exc. 19.

Defendant excepts. Exception allowed.)

A. There must have been. From the 16th all the checks that were issued up to the second cleanup were honored, but after the second cleanup there was

six thousand dollars— Well, yes, there was about four thousand dollars' worth of checks that were not honored.

Q. That were not paid?

A. Yes.

Q. That couldn't be. If you can give us an idea from your data as to how many checks were outstanding that were not paid by the bank, why, give it to us.

(Defendant excepts as immaterial. Overruled.

Exc. 20.

Defendant excepts and exception allowed.))

Q. I think you misunderstood the question. I want to know how many checks that you had issued in behalf of Mitchell & Co. were outstanding, that hadn't been paid by the bank on the 31st day of July, 1913; can you give us some idea as to that?

A. About \$2594.00.

Q. Do you understand the question?

A. I am just looking. I think I have that data of the total wages due. That is what you mean.

Q. It may be.

A. I presume you could tell by that. I can go by the check book.

Q. I am asking you this question: At the date of July 31st had you issued checks to all your men?

A. Yes, sir.

Q. Every man that you owed money to had a check?

A. They all had checks.

Q. And those were outstanding, checks against

the American Bank?

A. Exactly.

Q. Whatever the amount then of your indebtedness to your labor was upon the 31st day of July, that amount of checks were outstanding?

A. Deducting \$3071.00 from the total and it would leave about \$8000.00, I think.

Q. About how much?

A. \$3000, I mean.

Q. Do you mean to say that on the 31st day of July, 1913, there were outstanding checks to the amount of three thousand dollars?

A. I have to go through that check book and count them up.

Q. If you don't know, I don't. The total wages due you have on the assets there. Pay attention to what I am asking you and not let your mind be directed to something else. I asked you if you had issued checks to all the men you employed out there and to whom you owed money.

A. Yes, I had.

Q. And all the money that you owed as bankrupts when you went through bankruptcy you owed on the 31st day of July, 1913?

A. Yes sir.

Q. So, whatever is shown on your schedule that you owed to labor those checks were outstanding and unpaid, were they not on the 31st of July, 1913?

A. Exactly. Yes. Well, it is in the schedule—
\$6000.00

Q. \$7000.00, is it not?

A. Or \$6000.00.

Q. That is the correct amount?

A. Yes, sir.

Q. And those checks were outstanding?

A. Those checks were outstanding?

Q. Do you know what became of those checks?

A. I couldn't say. The men have got them I suppose, most of them. They all got checks.

Q. Who did you first have dealings with, Mr. Fallon, so far as the bank was concerned,—what officer?

A. Mr. Hurley.

Q. What was the extent of your dealings with Mr. Hurley? I mean—

(Interrupted.)

(Defendant objects as immaterial. Mr. Marquam states he wants to show who in the bank had knowledge of the facts in the matter. Objection overruled.

Exc. 21.

Defendant excepts. Exception allowed.

A. I made several little borrows of him for the company. Mr. Hurley went to Iditarod, and after he went I had dealings with Mr. Bruning. I have known him ever since I have been in the camp, since 1904; I think I was here before Mr. Bruning came. When I came in from Ester Creek I only went in the bank on business.

Q. Were the affairs of the copartnership and

your venture out there discussed at all with Mr. Bruning?

A. No, not especially, any more than to say: 'Well, how is she going?' Of course, the second cleanup I brought in, the mine was beginning to show up a little better, and we had bright hopes for the next cleanup, that it would be considerable better and that we would be able to wipe out the obligations.

Q. As between your partners, I understood you to say a while ago that you were the member of the firm that transacted all the business with the bank?

A. Yes, sir, I was.

Q. State what Mr. Bruning said to you when the cleanup came in which amounted to thirty-seven hundred odd dollars, after your conversation with him over the 'phone that you expected to have a cleanup of \$8000.00.

A. I didn't talk with Bruning that night at all. He was busy. I just simply handed the dust to Mr. Hopkins, who said he would attend to it immediately he got a chance to blow it. And when I went back then, Mr. Bruning was there at the time, and he said: "We are not quite ready yet, Jim." I said: "Let her go until the morning." So I went home.

Q. What did he say to you in the morning?

A. In the morning he told me, he said he was certain he could not carry us any longer. He said: "Jim, we had to meet all those notes, and I am instructed to take in all the overdrafts."

Q. What did he say, if anything, about you not having a better cleanup?

A. He said it was a poor cleanup; that was all.

Q. When did he tell you that,; the night of the 31st of July or the morning of the 1st of August?

A. The morning of the first.

Q. You did, as a matter of fact, did you not, know the amount of the gold dust, and the bank knew it, on the evening of the 31st?

A. I had the gross, you know, the same as it tallied when Paul weighed it up.

Q. You didn't know what the net was?

A. No, we didn't have a chance to blow it out there. Mr. Bruning said—

(Interrupted.)

The Court: The question is answered.

Mr. Marquam: On the 31st of July, 1913, or at any other time, did Mr. Bruning or any member of the bank make inquiry of you in regard to your financial standing or the financial standing of the firm or its individual members, that you did not answer?

(Defendant objects as immaterial. Objection overruled.)

Exc. 22.

Defendant excepts. Exception allowed.

A. No, sir, they never inquired of me.

Mr. Marquam: You may cross-examine.

Cross-examination.

By Mr. Clark: You had a fixed valuation that they paid you at the bank for the gold dust, did you

A. No, sir.

Q. You understand something about bookkeeping, don't you?

A. A little.

Q. You know that if, upon the date that last clean-up came in and was deposited in the bank, your account was on the red so many hundred dollars or so many thousand dollars, that this cleanup would be put on the other side and it would automatically balance itself, wouldn't it?

A. I couldn't say anything about that; I am not in the banking business.

Q. If you owed them at that time say \$2500.00 on the 31st of the month, and you should bring in something over \$3000.00 and deposit it, it would leave to your credit \$500.00. You understand that the debits are entered on one side and the credits on the other?

A. Exactly.

Q. And the difference between them is between your credit balance and your debit balance?

A. Yes.

Q. Now, these notes—may I see the notes?

A. Certainly. (Hands same to Mr. Clark.)

Q. There was another note, wasn't there?

A. That is all I have got.

Q. Mr. Bruning had deposited some money to your credit?

A. Yes, he deposited it to carry us along; \$500.00.

Q. Mr. Bruning had helped you along individually by depositing \$500.00.

A. He had; we couldn't do any more with the bank, but he had helped us individually.

Q. He put in his own note to the bank to cover that overdraft?

A. Yes.

Q. And to be taken out of the money when you brought in a cleanup? That was understood?

A. There was no agreement at all; I never asked him to do that, so far as that goes.

Mr. Clark: We ask to introduce in evidence the bank book.

(There being no objection, the bank book is admitted in evidence, and marked "Defendant's Exhibit 1." The entries therein are as follows:

Q. When you came in on the 31st, you expected to go back and go to work?

A. I certainly did.

Q. You had the ground blocked out?

A. Yes, everything was in working shape.

Q. And you had your crew there?

A. The crew were there.

Q. And you were going back and continue mining within a day or two?

A. Exactly.

Q. Was there any work actually going on while you were in town?

A. I immediately sent word out to my partner when Mr. Bruning told me that I couldn't—(interrupted.)

Q. Was there any work going on while you were absent?

A. Yes, there was.

Q. They were continuing to work?

A. Yes.

Q. The ground looked fairly good at that time?

A. It did.

Q. A pretty good paystreak and considerable water mixed up with it?

A. Well, the ground was looking better.

Q. It was getting better as you went along?

A. That is what I understood from my partners there.

Q. During the month you called up once or twice and told Mr. Bruning that you had drawn checks,

and asked him to honor them?

the cleanup, that we expected \$8000.00—that my part-

A. I think I called him up once and told him about
ners expected that.

Q. And you asked him if he would not honor the
checks until the cleanup got in?

A. Yes.

Q. And he said he would honor the checks until
the cleanup got in?

A. He said that was all right.

Q. And then he told you also that he had put
his note in there?

A. He did.

Q. And it was understood, of course, that that
would be paid when the cleanup came in?

A. Naturally I supposed it would, but there was
no direct understanding to that effect—never any
words to make any agreement like that.

Q. That was your understanding, however, be-
tween you?

A. Naturally a man expects to get his own.

Q. Didn't you tell Mr. Bruning on the evening
of the 31st or on the morning of the 1st that your
ground was looking very good out there and you
were going ahead?

A. In fact, yes, I did.

Q. And you had good expectations at that time?

A. Not the morning of the 31st.

Q. No. On the morning of the 1st, when you
went in the next morning?

A. Oh, no; in fact, I didn't say anything. After he gave me the vouchers that was enough for me. I said: "Good gracious, can't I check against this, Mr. Bruning?" It just paralyzed me, and I didn't stay in there; I went away.

Q. You didn't tell him you had checks outstanding?

A. No.

Q. He didn't know that; he simply told you that he couldn't carry you longer?

A. He knew that. I said: "The checks are made out for the men; I made them out before I came in."

Q. After the cleanup, or before you came in, you made the men's checks out.?

A. I made the men's checks out the night before.

Q. After you had had your cleanup?

A. No, sir, before the cleanup; never dreaming but what they would be recognized and cashed.

Q. One of those checks was presented to the bank before you got in here?

A. There was one, as I told you,—McLean.

Q. He was a wood man?

A. He was teaming. And Mr. Bruning told him —(interrupted.)

Q. Never mind what he told him; that is heresay. You never told Mr. Bruning at any time that things were not looking well out there, did you?

A. No, sir, I did not.

Q. He was always friendly when you came into

the bank; he asked you how things were going and you expressed yourself?

A. Naturally so.

Q. And when you came in this time with the cleanup, you say you didn't talk with him at all the next morning, and that conversation you have related is practically all of the conversation you had there?

A. Why, that is all. I was taken aback because the men couldn't get their wages, and he said he had done the best he possibly could with us in carrying us along, but he had to take in his overdrafts.

Q. You recognized that he had done the very best he could?

A. I certainly did.

Q. He had even put up a note of his own for \$500.00 to carry you through to the cleanup?

A. Yes, and I thought he would probably carry us along a little while again, because we all fully expected to get into better ground.

Q. And you still believed that if you had continued you would have gotten into better ground?

A. I believe we would, myself, for a fact.

Mr. Clark: That is all.

Redirect Examination.

By Mr. Marquam: Mr. Fallon, you made one statement in answer to Mr. Clark's questions: That the bank, for this last cleanup, that paid you at the rate of \$16.40?

A. According to the book.

Q. That is just according to their own figures in the book?

A. Yes.

Q. Then as a matter of fact you were not paid anything except as they set it off against your account?

A. Yes.

Mr. Clark: That is calling for his conclusion. It shows that they were credited the same as they always were in that book.

The Court: I understood it to be \$16.47 an ounce.

Mr. Marquam: Mr. Clark used that particular word: "You were paid sixteen dollars and forty cents for this last cleanup."

Mr. Clark: I don't mean paid in cash; he was credited with that much in the book.

Mr. Marquam: That is all you mean by that answer?

A. That is all.

Q. What, if anything, did you say to Mr. Bruning, when you came in with this last cleanup, either that night or the next day, about things looking better out there?

(Defendant objects as not redirect examination. Objection overruled.)

Exc. 23.

Defendant excepts. Exception allowed.)

A. I told Mr. Bruning when he passed me the vouchers, the first thing I told him, I said: "Mr. Bruning, I am very sorry that you have come to that

conclusion that you can't carry us any longer and honor these checks that I have made out for the men, as the ground is looking a little better, and I have no doubt that we will probably be able to get through, be able to square up everything." I told him that.

Q. What did he say to that?

A. He said he couldn't go any further for the present; he couldn't do it. He said they couldn't carry us any longer.

Q. When this conversation occurred with you and Mr. Bruning, is that the time you told him that these checks were outstanding?

A. I told him that the men's checks were all issued to them; that is what I told him.

Q. Of what men?

A. For wages.

Q. For partial payment or full payment?

A. Up to date.

Q. Mr. Bruning, as a result of that conversation, knew that there were outstanding checks against his bank drawn by yourself for all the money that was owed by you to your workmen?

(Defendant objects as immaterial. Objection overruled.

Exc. 24.

Defendant excepts. Exception allowed.

A. Exactly.

Q. Was there any intimation to Mr. Bruning on your part as to the amount of these checks that were

outstanding?

A. No, sir.

Q. A simple statement to him that checks for the full amount of these wages were outstanding?

A. For the full amount of the wages; yes.

Mr. Marquam: That is all.

Mr. Clark: That is all.

JOHN KNOX BROWN, sworn as a witness for plaintiff, testified as follows:

Direct Examination.

By Mr. Marquam:

A. My name is John K. Brown; I am the United States commissioner for the Fairbanks precinct, and as such have custody of the records of the commissioner. I have here the docket of the civil cases, called the "Civil Docket."

Q. Do you find docketed in that book a case entitled Rutherford against T. Mitchell & Co.?

A. I find a case of Roy Rutherford and S. Widman— (interrupted).

Q. Against T. Mitchell & Co.?

A. Yes; as copartners. James Fallon, Thomas Mitchell, and Herman Fawcett, mining copartners under the firm name of Mitchell & Co. The book shows that the action was commenced on July 31st, 1913.

Mr. Marquam: We offer in evidence the docket entries with reference to the case of Rutherford and Widman against T. Mitchell & Co.

Mr. Clark: We object, beyond the mere recital that

the complaint was filed and the writ of attachment was issued. We think, beyond that, that it is not the best evidence in regard to any service, or anything of that kind.

(Objection overruled.)

Exc. 25.

Defendant excepts. Exception allowed.)

Mr. Clark: That is, we object to all except that particular part.

The Court: Yes. It may be admitted and marked Plaintiff's Exhibit H.

Mr. Marquam: We do not want to mark this book.

Witness: It is on page 66 of the last Civil Docket, the current civil docket.

Mr. Marquam: That is all, Mr. Brown.

Mr. Clark: No cross-examination.

MATTHEW O. CARLSON, sworn as a witness for the plaintiff, testifies as follows:

Direct Examination.

By Mr. Marquam:

A. I am a deputy United States marshal and was such on the 31st of July, 1913. I have in my possession records or returns of garnishment proceedings in the case of Rutherford and Widman against the copartnership of T. Mitchell & Co.

Q. How is it that those papers are still in your possession, or in the possession of the marshal?

A. It was through an oversight in not getting them onto the original writ.

Q. Where have those papers been all this time?

A. In the files in our office in that case.

Q. In the marshal's office?

A. Yes, sir.

Q. What is the paper you have?

A. Return of the marshal and the answer of the garnishee.

Q. What garnishee?

A. The American Bank of Alaska.

Q. Those are the original papers in the possession of your office at the present time?

A. Yes, sir.

Q. And were not attached to the original writ when it was returned, through an oversight?

A. Yes, sir.

Mr. Marquam: We offer these papers in evidence.

(Defendant objects as irrelevant, incompetent, and immaterial, not tending to prove or disprove any of the issues in this case, and not the best evidence, and that this return seems to be but hearsay, by a person not sworn as a witness. Mr. Marquam states that the return is made by Deputy Fife. Mr. Clark, for defendant, states that he objects for the reason that it is not attached to the original writ of attachment, is not a part of an official record, and therefore is not pertinent, is not prima facia evidence of what it contains; that it is merely a paper found by Mr. Carlson in the files of their office, and is therefore subject to be proven the same as any other instrument; that it is not attached to any other instrument, or any part of an official record. Mr. Clark states

1	Up-right Engine, 6 H. P.
2	Circular Saws, 28"
38ft	Belting 4".
150ft	Iron Pipe more or less.
400ft	Iron Pipe more or less.
1500 ft	Steel Cables more or less
1	Iron Dump Bucket
1	Trolley Carriage
92	Mining Timbers
9	Cords Wood more or less
8	Cords Wood more or less
1	Gin Pole
1	Boiler House
1	American Hoist
1	Boiler No. 1034—50 H. P. Albion Works.
1	Boiler Scotch Marine 50 H. P.
1	Blacksmith Bellows.
1	Drill Press
20	Picks
1	Anvil
1	Grind Stone
2	Hammers
18	Steel Drills more or less
150 lbs	Blacksmith Coal
2bx	Candles
7 lbs	Cup Grease
3 gal	Red Oil
1/2gal	Lubricating Oil
1	Pipe Vise
1	Bench Vise

- 1 Feed Pump
- 1 1½ in. Pump
- 1 2 in. Pump
- 1 Centrifugal Pump
- 1 Centrifugal Pump Engine
- 1 1 in. Pump

Staging for Bin, Dump, and Sluice Boxes.

- 1 Set Dies, Pipe
- 1 Set dies, Blacksmith
- 75 ft ¾ in. rope
- 75 ft 1 in. rope
- 1 Mess House

Contents of Mess House

- 1 pr Stilliards
- 1 pr Fairbanks Scales
- ½ kit Salmon Bellies
- ½ kit Mackerel
- ¾ cs Eggs
- 1 cs Cream
- cs Potatoes
- 45 lbs Butter
- 20 lbs Lard
- 5 lbs Onions
- ¼ drum Cheese
- 3 bot Catsup
- 1 gal Molasses
- 1 can Sausage Meat
- 2 can Roast Beef
- 1 pound tea
- 1 box Curry Powder

- 1 bot Horse Radish
- 3 cans Tomatoes
- 3 cans Cayenne Pepper, $\frac{1}{4}$ lb
- 1 can Ginger $\frac{1}{4}$ lb
- 1 can Sage $\frac{1}{4}$ lb
- 7 cans Sweet Potatoes
- 1 pc Bacon about 6 lbs
- 5 bars Laundry Soap
- 5 lbs Raisins
- 3 lbs Vermicelli
- $\frac{1}{2}$ gal Syrup
- 35 lbs Cereals
- 2 cans Carrots
- 7 lbs Macaroni
- 5 lbs Y. A. Cheese
- 6 jars Jam
- 1 5-lb tin Jelly
- 1 5-lb tin Mince Meat
- 5 only lamps
- 150 lbs Flour hard
- 20 lbs Coffee
- 27 cans Lobster
- 33 cans Salmon
- $3\frac{1}{2}$ lbs Cocoa
- 6 lbs Currents
- $1\frac{1}{4}$ lb Hops
- 2 lbs Baking Soda
- 10 lbs Tapioca
- 10 lbs Corn Meal
- 7 lbs Macaroni

3 pkg Corn Starch
 2 bot Curry Powder
 1 bot L. & P. Sauce
 1/2 lb Cream of Tartar
 25 lbs Dried Apples
 1 cs Plums
 15 cans Oysters 2 lb
 8 can clams 2 lb
 40 lbs White Beans
 20 lbs Lima Beans
 10 cans String Beans
 19 cans Corn
 15 lbs Pow'd Sugar, Aprox
 3 gal Maple Syrup Aprox
 11 cans Cabbage
 1 gal Apricots
 8 cans Shrimp

And all other Personal property on said claim.

On Aug. 2nd, 1913 under instructions from Louis K. Pratt & Son, the Plaintiff's attorneys I released the following property: One boiler; one hoist; one bellows; one anvil; one bucket; one 1 in Worthington pump; one 1 1/2 in. pump; one 2 in. pump; one centrifugal pump; and engine to run same; one 1 in. pump.

And I placed in charge Geo. A. Palmer as custodian in charge of said property.

Marshal's fee \$4.00

22 mi at 15c 3.30

\$7.30

L. T. ERWIN,
United States Marshal
By J. H. MILLER,
Deputy.

(Endorsed: "No. 2011 Pltfs Exhibit I G. Johnson
Trustee Plaintiff vs. Am. Bk of Alaska Defendant."
"Filed in the District Court Territory of Alaska 4th
Div Nov 1 1915 J. E. Clark Clerk By Sidney Stewart
Deputy.")

PLAINTIFF'S EXHIBIT 'J.'

In the Commissioner's Court for the Territory of
Alaska, Fairbanks, Precinct, Fourth Division.

Roy Rutherford and S. Widman, co-partners doing
business under the firm name of the Independent
Lumber Company, Plaintiffs,

vs.

James Fallon, Thomas Mitchell and Herman Faw-
cett, mining co-partners under the firm name of
Mitchell & Company, or Fallon, Mitchell & Com-
pany, Defendants.

No. . . .

Answer of Garnishee.

To the United States Marshal, Fourth Division,
Territory of Alaska.

In reply to your notice of garnishment served in
the above entitled action, we beg to report that we
have no gold dust or other personal property or
money in our possession belonging to the defendants
above named or either of them nor have we any

credits due to them or either of them.

AMERICAN BANK OF ALASKA,

By A. BRUNING, Cashier.

Dated at Fairbanks, Alaska this 1st day of August, 1913.

(Endorsed: "No. 2011. Pltfs Exhibit J. G. Johnson Trustee Plaintiff vs. Am Bk of Alaska Defendant." Filed in the District Court Territory of Alaska 4th Div. Nov. 1 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

Mr Marquam: That is all.

Mr. Clark: No cross-examination.

JOHN K. BROWN, a witness for plaintiff, recalled, testified as follows:

Direct Examination, By Mr. Marquam.

A. I have in my possession all the papers in the case of Rutherford and Widman against Mitchell & Co., which were filed in the Commissioner's office. The complaint is here. (Hands same to Mr. Marquam).

Mr. Marquam: We offer the complaint in evidence.

'(Defendant objects as immaterial, and not tending to prove or disprove any issue in the case. Objection overruled.

Exc. 27.

Defendant excepts. Exception allowed. Complaint marked "Plaintiff's Exhibit K", and is as follows:)

PLAINTIFF'S EXHIBIT 'K.'

In the Commissioner's Court for the Fairbanks Precinct, Fourth Division, Territory of Alaska.

Roy Rutherford and S. Widman, co-partners doing business under the firm name of the Independent Lumber Company, Plaintiffs,

vs.

James Fallon, Thomas Mitchell and Herman Fawcett mining copartners under the firm name of Mitchell & Company or Fallon, Mitchell & Company, Defendants.

No.....

Complaint.

Comes now the above named plaintiffs and for cause of action against defendants allege:

1. That for all times herein mentioned Roy Rutherford and S. Widman have been and now are copartners doing business under the firm name of the Independent Lumber Company, in the Fairbanks Precinct, Alaska.

2. That for all times herein mentioned, the above named defendants have been and now are a mining copartnership doing a mining business under the firm name of Mitchell & Company or Fallon, Mitchell & Company, on the Hoffman Bench on Ester Creek, Fairbanks Precinct, Alaska.

3. That between June 4th 1913 and June 12 1913, plaintiffs sold and delivered to defendants, at their special instance and request, lumber of the market value of \$467.³⁶₄₆, which price defendants agreed to

JEB

pay. Plaintiffs also shipped said lumber on or about said last date and paid freight on said lumber and an additional amount of freight in the sum of \$18.25 and defendants have paid only the sum of \$75.00 and no more, thereon.

4. That on or about the 10th day of July plaintiffs and defendants agreed that there was due and owing plaintiffs from defendants for the matters above set forth, the sum of \$410.80 which defendants promised to pay.

Wherefore plaintiffs pray judgment in their favor and against defendants in the sum of \$410.80 and for the costs and disbursements of this action and a reasonable attorneys fee.

LOUIS K. PRATT & SON,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss:

Roy Rutherford being first duly sworn on oath says: I am one of the plaintiffs in the above entitled action; have read the foregoing complaint and the allegations therein contained are true as I verily believe.

ROY RUTHERFORD,

Subscribed and sworn to before me this 31st day of July 1913.

HARRY E. PRATT,
Notary Public in and for Alaska.
My commission expires June 24th 1916.

(Endorsed: "897 In the Commissioner's Court for the Fairbanks Precinct, 4th Division, Territory of Alaska. Roy Rutherford et al. vs. James Fallon et al. Complaint. Filed July 31, 1913. John F. Dillon, Commissioner & Ex Officio Justice of the Peace. Louis K. Pratt & Son Attorneys for Plaintiffs. Ent. p. 66.")

(Endorsed: "No. 2011 Pltfs Exhibit K. G. Johnson Trustee vs. Amer Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska 4th Div. Nov 2 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

Mr. Marquam: Now we offer the writ of attachment in this case. The papers introduced yesterday should be attached to this, but by mistake were not.

Defendant objects as immaterial, not tending to prove or disprove any issue in this case. Objection overruled.

Exc. 28.

Defendant Excepts. Exception allowed. Writ of attachment marked as "Plaintiff's Exhibit L", and is as follows:

PLAINTIFF'S EXHIBIT 'L.'

In the Commissioner's Court for Fairbanks Precinct,
Fourth Division, Territory of Alaska.

Roy Rutherford and S. Widman, copartners doing
business under the firm name of the Independent
Lumber Company, Plaintiff

vs.

James Fallon, Thomas Mitchell and Herman Fawcett mining copartners under the firm name of Mitchell & Co. or Fallon, Mitchell & Co. Defendants.

No. 897.

Writ of Attachment.

The President of the United States of America, to the Marshal of the Territory of Alaska, Fourth Division, or to his Deputy, Greeting:

Whereas, plaintiffs above named hath complained that defendants above named are justly indebted to them to the amount of Four hundred ten and 80-100 Dollars andcents and the necessary affidavit and undertaking herein having been filed as required by law.

We therefore command you, That you attach and safely keep all the personal property of the said defendants not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, as above stated, to be found in your Division of said Territory, and as shall be of value sufficient to satisfy the said debt and the costs and disbursements of the said paintiff herein. And of this writ make due service and return.

Given under my hand and official seal this 31st day of July 1913.

(SEAL)

JOHN F. DILLON,

Commissioner and ex officio Justice of the Peace.

(Endorsed: "4th Div. Dist. of Alaska Received

Jul 31 1913 Office of U. S. Marshal Fairbanks, Alaska. Marshal's Docket No. 125. Writ docketed July 31 1913. Return docketed Aug 12 1913." "Orig. No. 897. In the Commissioner's Court Territory of Alaska, Fourth Division, Fairbanks Precinct. Roy Rutherford et al Plaintiff vs. James Fallon et al Defendant Writ of Attachment Returned and filed this 12 day of Aug 1913.....Commissioner and ex officio Justice of the Peace. Ent. p. 66." "No. 2011 Pltfs Exhibit L. G. Johnson Trustee Plaintiff vs. Am. Bk. of Alaska Defendant." "Filed in the District Court Territory of Alaska 4th Div. Nov. 2 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

Mr. Marquam: That is all.

Mr. Clark: No cross-examination.

HERMAN FAWCETT, sworn as a witness for plaintiff, testified as follows:

Direct Examination, By Mr. Marquam:

A. My name is Herman Fawcett, I am one of the copartners of the firm of T. Mitchell & Co., mentioned in this case, and was such on the 31st day of July 1913, which was the date of the last cleanup that we had. The cleanup was held during the day and in the evening I was in town. I came in about 5 o'clock. I had occasion to go to the American Bank that evening, somewhere near 6 o'clock. I came in from the claim on the 5 o'clock train, with James Fallon, who had the cleanup. I went to the bank with him when he delivered it.

Q. What was done when you took the gold into the bank?

A. Mr. Fallon just passed it through the window.

Q. What time was that ?

A. Between five and six.

Q. How long did you remain there?

A. Only a few minutes.

Q. When did you go back there again the first time after that?

A. Probably 15 minutes after that.

Q. State to the jury what you went back to the bank for on this second occasion, about 15 minutes after you delivered the gold dust?

A. I heard that there was to be an attachment served against the gold dust, and I went in to find out whether anything could be done.

Q. Who did you understand was levying an attachment?

A. Jack Nelson.

(Defendant objects as hearsay. Objection Overruled.

Exc. 29.

Defendant Excepts. Exception allowed.)

Q. The firm was indebted to Jack Nelson at that time in what sum?

A. In the neighborhood of \$1000.00.

Q. When you went back to the bank who did you see?

A. Mr. Bruning.

Q. What conversation occurred between you and Mr. Bruning at that time?

A. I asked Mr. Bruning if the dust could be attached.

Q. What did he say?

A. He said: No, that it could not; it had been applied to overdrafts and checks that had been left there for collection.

Q. That was at what time?

A. Somewhere round 6 o'clock.

Mr. Marquam: You may cross-examine.

Mr. Clark: No cross-examination.

TONY LIONGAVICH, sworn as a witness for plaintiff, testified as follows:

Direct Examination, By Mr. Marquam:

A. My name is Tony Liongavich. I am a miner and worked during the summer on the Hoffman Bench for Mitchell & Co. I came to town about the 1st of August, at the same time these gentlemen brought in the last cleanup,—I came on the same train, on the 31st of July.

Q. What was your purpose in coming to town?

(Defendant objects as immaterial. Objection overruled.

Exc. 30.

Defendant excepts. Exception allowed.)

A. I came in to town to cash in my check.

Q. How much of a check did you have?

A. \$148.50 I believe.

Q. Did you cash your check?

A. I went to the bank on the morning of the 1st of August.

Q. Did you cash your check?

A. No sir.

Q. When did you go to the bank?

A. On the 1st of August in the morning.

Q. What time in the morning of the 1st of August?

A. I believe about 10 o'clock; I was waiting for the bank to open.

Q. Did you go into the bank to cash your check as soon as it was open?

A. I went into the bank right after—as soon as it was open. Yes.

Q. What was the result?

A. Well, sir, when I went in they refused to cash it. They told me the gold dust was attached. That was all.

Q. Who told you that?

A. Mr. Bruning.

Mr. Marquam: That is all.

Mr. Clark: When did you receive that check?

A. On the 31st.

Q. At Ester?

A. Yes.

Mr. Clark: That is all.

HARRY E. PRATT, sworn as a witness for plaintiff, testified as follows:

Direct Examination, By Mr. Marquam:

A. I am an attorney at this bar and was attorney

for Mr. Rutherford in the case of Rutherford against Mitchell & Co., commenced in the commissioner's court sometime in 1913. I attended to all the legal matters connected with that case.

Q. The records of the commissioner's office show in that case that an attachment was issued and that the American Bank was garnisheed?

Mr. Brown: The records in the commissioner's office don't show that.

Mr. Marquam: It should be there. It is on record in the marshal's office; the return of the marshal shows that he garnisheed the American Bank.

Q. Did you have a conversation with the officers of the American Bank on the 31st day of July 1913 relative to this garnishment?

A. I did.

Q. What time of day or evening, if you know, was this garnishment served?

A. It was served along about 8:30 or 9 o'clock in the evening.

Q. Of what day?

A. Of the 31st of July 1913.

Q. When did the conversation that you had with the bank officials occur with reference to that time?

A. Well, it occurred just after the garnishment had been served—a short time after.

Q. What was the conversation that you had and with whom?

A. I called up the American Bank and got either Mr. Bruning or Mr. Rettig,—I couldn't say which

one, but it was one of the two,—and I asked them what we caught in the garnishment in Rutherford against Mitchell & Co., and he answered that we didn't catch anything, and I said: "How about that cleanup that came in this afternoon?" "Well, he said, "they were away in the red to us, and we just credited that cleanup, and they are still away in the red."

Q. Was that the extent of the conversation?

A. Yes, that was all.

Q. Who was Mr. Rettig that you refer to in your testimony?

A. He was the assistant cashier over at the bank.

Q. And Mr. Bruning was the cashier?

A. Was the cashier, yes.

Q. It was one of those two, but you don't know which one?

A. No, I don't remember which one.

Mr. Marquam: Cross-examine.

Cross-Examination, By Mr. Clark:

Q. Mr. Pratt, when they said they were away in the red, you understood that to mean that the account was overdrawn, and the overdraft was represented by red ink in the bank books. That is what you understood?

A. I understood that they were away in debt to them. That is what I understood by "in the red."

Q. You understand that when they say a man is "in the red" that that means that he has not any balance, but that he owes them?

A: Yes, that he is in debt to them.

Q. That he had overdrawn his account?

A. Yes.

Mr. Clark: That is all.

Mr. Marquam: That is all.

JAMES J. FALLON, a witness for plaintiff, recalled, testified as follows:

Direct Examination, By Mr. Marquam:

Mr. Fallon, during the month of July, while you were carrying on operations out there, what was the average number of men employed?

(Defendant objects as immaterial. Objection overruled.

Exc. 31.

Defendant excepts. Exception allowed.)

A. About 50 men—50 to 55.

Mr. Marquam: Cross-examine.

Mr. Clark: No cross-examination.

MATTHEW O. CARLSON, a witness for plaintiff, recalled, testified as follows:

Direct Examination, By Mr. Marquam:

I will ask you if you are familiar with the signature of W. W. Fife, who was a deputy—(interrupted)

A. I am.

Q. I will ask you if that paper, which you examined yesterday and testified about, and which is marked "Plaintiff's Exhibit I", bears the signature of Mr. Fife?

A. It does.

Q. He was a deputy marshal at that time in your

office?

A. He was.

Mr. Marquam: That is all.

Mr. Clark: No questions.

Mr. Marquam: That is our case.

Plaintiff Rests. Jury Retires.

Mr. Clark: At this time we ask the Court,—move the Court,—to direct a verdict,—to direct the jury now trying this case to bring in a verdict in favor of the defendant in this case, on the grounds: First. An absolute failure of proof of the essential elements required by the Bankruptcy Law to be proven before this case could be decided in favor of the plaintiff, or before they can prove a *prima facie* case; Second. On the ground that it clearly and conclusively appears from the evidence introduced in this case that there was no preference; that the defendant in this case, at the time of the deposit of the gold dust in question on the 31st day of July 1913, did not have reasonable cause to believe, or any cause to believe, (a) that the firm of Mitchell & Co. were insolvent, or (b) that by applying this account to wipe out the overdraft and the overdue notes, a preference could thereby be effected; Third. On the further ground that the defendant in this action had, as a matter of right under the law,—under the Bankruptcy Law, and under the general law,—the right to credit the proceeds of the sale of that gold dust to the deposit account of Mitchell & Co, and had a right to set off against said deposit all overdue in-

debtedness then held and owned by the bank due and owing from the firm of Mitchell & Co.

Mr. Pratt: Will you permit me for a moment? This motion comes out of time. The motion for a nonsuit comes at the end of all the evidence, and it can not be entertained at this time.

Mr. Clark: We are asking that, if the Court does not grant us a directed verdict, then we move the Court for a nonsuit on the grounds we have heretofore set forth as grounds for our directed verdict.

(Motions Denied.)

Exc. 32.

Defendant excepts. Exception allowed.)

A. BRUNING, a witness sworn for defendant, testifies as follows:

Direct Examination, By Mr. Clark:

A. My name is A. Bruning. I am cashier of the American Bank of Alaska, the defendant in this case, and was such cashier on the 31st day of July 1913. I am acquainted with Mr. J. J. Fallon. I may know Mr Fawcett, but I am not very much acquainted with him.

Q. Do you remember the incident of Mr Fallon bringing some gold dust to the bank on the afternoon of the 31st day of July 1913?

A. I remember him bringing some gold dust in, yes sir.

Q. Do you remember, Mr Bruning, the bank purchased that gold dust from Mr Fallon at that time?

A. The bank made a purchase of that gold dust—
(interrupted)

(Plaintiff objects and asks that the witness state what happened and the Court directs that witness answer the question by "yes" or "no.")

Q. Do you remember whether or not you purchased the gold dust.

A. Yes sir.

Q. What did you do? As the question now stands, you say you remember whether you purchased it. Did you purchase it?

(Plaintiff objects as leading and asks that witness state what happened. Objection overruled.)

A. We bought the gold dust and placed the proceeds to the credit of Mitchell & Co.

Q. Why did you place it to the credit of T. Mitchell & Co?

A. Mr. Fallon was a member of the firm of T. Mitchell & Co., and they had an account with the bank for a month or two.

Q. Have you any independent recollection of just the exact amount of gold dust that you purchased from Mr. Fallon at that time?

A. There is a slip there.

Q. I show you this instrument. (Hands paper to witness.) and ask you what that is, if it is an official record of the bank?

A. It is a teller's gold dust slip.

Q. What is the procedure when gold dust is brought into a bank? Where it is purchased by the

bank to whom does it first go?

A. To the gold dust teller.

Q. Who was your gold dust teller at that time?

A. Mr Hopkins.

Q. Then, after it goes to the gold dust teller, what does he do?

A. He examines the poke and looks at the gold dust, and flips it, as we call it, to see how clean the gold dust is. If it shows any great amount of dirt or black sand he proceeds to clean it. As I remember this particular lot of dust it was very dirty, probably 10 or 15 per cent. of the total original weight consisted of black sand and other dirt, and therefore the teller has got to clean it. That might have taken half an hour; I don't remember how long it did take.

Q. After he gets it cleaned, what does he do toward ascertaining the amount thereof?

A. After cleaning, he weighs the gold dust, and figures out the amount of ounces at a certain rate at which gold dust is valued at from certain claims. It varies on different creeks. In this instance, he paid for this gold dust at the rate of \$16.40 per ounce.

Q. How many ounces of gold dust as represented by that slip were the property of T. Mitchell & Co.?

A. 220.69 oz.

Q. What was the total value in cash?

A. \$3734.12.

Q. What was done with the proceeds of the purchase of that gold dust?

A. After Mr Hopkins made out this slip, I presume he turned it over to me, and I made out a deposit slip whereby I placed it to the credit of Mitchell & Co.

Q. Is that the deposit slip (indicating a paper).

A. That is the original deposit slip, yes sir.

Q. What date does that bear?

A. July 31st.

Q. What amount of money is represented by that deposit slip?

A. \$3734.12.

Q. To whose credit was it placed?

A. Mitchell & Co.

Q. In whose handwriting is that slip?

A. This is my writing.

Q. Is that the correct date on there?

A. That is the date that the gold dust was bought.

Q. On what date was it placed to the credit of T. Mitchell & Co., if you know?

A. Well, now, I don't remember.

Q. If I show you the bank book, could you then tell?

A. Presumably the same date.

Q. I will show you this bank book which has been introduced in evidence and marked "Defendant's Exhibit 1", and ask you if, by examining that, you can tell what date it was placed to their credit?

A. On July 31st.

Q. What kind of an account did they have, a special or a general account?

A. A general checking account.

Q. What account was that particular item placed to; to the credit of what particular account was that item placed?

A. To the credit of Mitchell & Co.

Q. To their general account?

A. To their general checking account.

Q. Is this one of your original bank records?

A. That is an original bank record, yes sir.

Q. Would you have any objection to having it placed in evidence here?

A. I want it back or a certified copy.

Mr Clark: We offer it in evidence and ask that it be marked as "Defendant's Exhibit 2".

(Paper so marked, and attorneys for respective parties agree that it may be withdrawn and returned to the defendant bank at the conclusion of this trial, the Court having admitted it in evidence.)

We also offer in evidence, subject to the same agreement that we may withdraw it at the conclusion of the trial, this slip which Mr Bruning testified concerning, being the original gold dust teller's slip.

(There being no objection, the same is admitted in evidence and marked "Defendant's Exhibit 3".)

Mr Clark: I desire to read into the record the principal part of Defendant's Exhibit 2. (Reads:)

"Deposited in American Bank of Alaska, Fairbanks, Alaska, July 31, 1914," Under the head of 'checks',—"85 per cent. 267.87 oz. Advanced 16.40 \$3734.12".

I desire to read into the record Defendant's Exhibit 3. (Reads:)

"Gold dust purchased No. 4309. American Bank of Alaska, Iditarod Alaska. 7-31-1913. Adv. 267.87. M. & Co. 227.69 3734.12. Hoffman 40.18 659 at 16.40 per oz. Pay to the order of Mitchell & Co. 4393.12. Hop."

Q. How does it happen that this bears the word "Iditarod"?

A. That is some stationery that was returned from Iditarod when we closed up there, and we were using it up.

Q. The American Bank had a branch at Iditarod?

A. Yes.

Q. And you were simply using some of the stationery?

A. Yes.

Q. Mr Bruning, at the time this gold dust was brought into the bank, do you remember who brought it in?

A. I think it was Mr Fallon.

Q. Do you remember of having any conversation with him when it was first brought in?

A. Well, now, I don't remember of talking to him at the time there.

Q. Did you have any, later in the day?

A. That same afternoon I talked with him; yes.

Q. Do you remember what time he first came into the bank?

A. Shortly after—I think he came in on the eve-

ning train. 'What time I don't know—4:30 or 5 o'clock; or he came in on the auto; I don't remember how he came in.

Q. Do you say you remember having a conversation with him that afternoon?

A. After the gold dust was delivered and Mr Hopkins was cleaning it I believe yet, I (interrupted)

Q. Just state what the conversation was.

(Plaintiff objects as irrelevant, incompetent, and immaterial. Objection overruled.)

A. What was the question?

Q. What was the conversation you had with Mr Fallon that afternoon?

A. I don't know, as I had any particular conversation with Mr Fallon, unless—I told Mr Fallon that, after this gold dust was weighed, and the credit made of it, that I would charge up what notes we had in the bank, past due, against the account. As near as I remember, that is the only conversation I had with Mr Fallon.

Q. Was that actually done on that afternoon?

A. It was done the same afternoon; yes sir.

Q. When did you next see Mr Fallon, if you remember?

A. He may have been in again in the evening, or the next day, I don't remember.

Q. Where items of credit or debit come into the bank after banking hours, how are they handled so far as the individual ledger is concerned?

A. After 3 o'clock the individual ledger closes for

the day. Any business that comes in after 3 o'clock will not go on the individual ledger until the following day.

Q. The items that you give here, that are shown in this bank book of Mitchell and Company, a credit to their account of the proceeds of the gold dust on the afternoon of the 31st, under what date would that appear in the individual ledger?

A. On August 1st, if that was not a holiday.

Q. Would it appear on the next business day?

A. On the next day's business.

Q. Who was your bookkeeper at that time?

A. Mr Harry McLean.

Q. Do you remember, or can you, by examining that bank book, tell, when that book was balanced up, Mr. Bruning?

A. The last entry here shows July 31st, a credit. Now, 67 checks returned. It is here June or July 2nd. I don't know if that could be possible.

Q. Isn't that August?

A. It might have been August 2nd, but the sheet in the individual ledger will show the date that the book was balanced. It may possibly have been balanced on the evening of the 31st, in the afternoon, or not until next morning. I don't remember. I don't know anything about that.

Q. Was the account of Mitchell & Co., so far as the debits and credits are concerned, balanced on the 31st?

(Plaintiff objects as leading.)

Q. When were the accounts of Mitchell—(interrupted).

A. I don't know; the individual ledger will show, I guess.

(Plaintiff asks that the answer be stricken. Motion denied, as the answer seems to show that he has a book that will show.

Q. When the credit was made in their general bank book, what paper or instrument was made out at that time for the instruction of the bookkeeper relative to the entry?

A. The bookkeeper gets the deposit slip the next day.

Q. When that deposit slip was made out, so far as the physical act—or what would you say in regard to the physical act of crediting the account—was concerned? Had it not been consummated, that is, credited in the bank book account?

A. After the deposit slip had reached the bookkeeper. The transaction between the bank and the individual depositor had been transacted in the afternoon of the 31st.

Q. I show you this sheet and ask you what it is? (Exhibits a sheet to witness.)

A. That is the account of Mitchell & Co. with the bank.

Q. From what ledger is that taken?

A. The individual ledger.

Q. From an examination of that, when were the actual entries made by the bookkeeper carrying into

the individual ledger the credit given, as you say, on the 31st day of July?

A. On August 1st he made the entry here, a credit of \$3734.12.

Q. When were the overdue notes charged against that account?

A. According to this they were charged the same date, on August 1st, by the bookkeeper.

Q. What kind of a record would you make out to instruct him to make those entries?

A. It doesn't require any instructions. The tabs or checks are handed over to him, and the deposits are handed over to him, and it is his business to put them in the ledger. That is what he is paid for.

Q. But I am referring to the notes that the bank held at that time?

A. The notes are treated the same as a check would be. In some instances we treat the note the same way as a check; in other instances we make out a debit slip showing the amount of the note as well as the interest due up to date and charge it against the man's account, whoever it is against.

Q. What notes, if any, were charged against the account of Mitchell & Co., as shown by your records?

A. There was an \$850.00 note, a \$500.00 note, and part payment applied on another note.

Q. Had that other note ever been surrendered to them?

A. No sir.

Q. Have you the note still in your possession?

A. We have.

Q. How much of a credit was made on that?

A. I think it was \$135.00 and some odd cents.

Q. Would it show there, that credit?

A. No, that wouldn't show here; it would show in this \$1485.00 amount, I guess.

Q. That \$1485 was the sum total of the \$850.00 note, and the \$500.00 note, and the other credit?

A. Yes.

Q. When was the book balanced?

A. On August 2nd.

Q. Would that be the time it was handed back to Mr. Mitchell? (Means Fallon.)

A. I suppose so.

Q. Or to Mr Fallon, I meant.

Q. Mr. Bruning, did you, on the 31st day of July 1913, have any knowledge or information, of any nature or description, that would lead you to believe, or to think, that Mitchell & Co. were insolvent?

A. I did not.

Q. Did you, at the time of the charge against the account of Mitchell & Co. of those promissory notes, have any reason to believe, or any knowledge that would lead you to believe, that Mitchell & Co. would not pay their other creditors, and that the money you had received would be a preference?

A. I did not.

Q. Had you believed them insolvent or in danger of insolvency would you have permitted an overdraft in the bank?

(Plaintiff objects as mere speculation; let him state what he did, and not what he would have done. Objection overruled.)

A. I would not.

Mr. Pratt: When was that?

Mr Clark: I direct your attention to the 31st day of July 1913, and at all times between the 16th day of July and the 31st day of July, would you, if you had believed during any of that period that they were insolvent or in danger of insolvency, have permitted them any overdraft in the bank?

(Mr Pratt, for plaintiff, objects as immaterial. The Court rules that the witness may answer the question as to any of the dates mentioned, except the 31st.)

Q. Between the 16th and the 31st—I will ask another question. Mr Bruning, as cashier of the American Bank of Alaska, if you had any information or knowledge at any time between the 16th of July 1913 and the 31st of July 1913 that Mitchell & Co. were insolvent or in danger of insolvency, would you have permitted them to have an overdraft at that bank?

(Plaintiff objects as irrelevant, incompetent and immaterial. Objection overruled.)

A. I would not.

Q. Did you have any conversation with Mr Fallon over the 'phone at any time between the second cleanup and the third cleanup on this Hoffman Bench where they were working?

A. I think I had one or two conversations with

him.

Q. Do you know what the conversations were about?

A. Well, either he rang up or I rang up, I don't remember which. They began to issue checks, and I didn't want to pay them, not knowing how things were out on the claim, and Mr Fallon assured me that everything looked well, that the boxes looked good.

(Plaintiff objects as irrelevant, incompetent, and immaterial. Objection overruled.)

Q. Finish your answer. Was there anything further?

A. Nothing further.

Q. Anything said about his overdraft, or anything of that kind?

A. Upon the assurance that he stated, that the boxes looked good, I went to work and told him that I would take care of a reasonable amount of checks.

Q. Would those checks constitute an overdraft?

A. All the time.

Q. What, if anything, was said about when overdrafts would be taken care of?

A. At the first cleanup, it was understood.

Q. Did he mean the first subsequent cleanup?

A. The first cleanup they made.

Q. What about these notes that were in the bank, Mr Bruning? What was to be done with them?

A. Originally the notes, when they borrowed the

money the notes were supposed to have been paid at the first cleanup. They were not taken care of at the first cleanup, because they felt that labor and other bills, the laborers and other people wanted money, and they wanted the bank to kindly wait until the next cleanup. So we did wait until the next cleanup. Still they felt that the bank might wait. I told him my instructions were, when Mr Hurley went away, that I should charge up those notes. So, when the third cleanup came in, I charged up the notes, as I was instructed to by Mr Hurley.

Q. What is your rule about overdrafts?

Mr Pratt: You say you charged up the notes the first cleanup? (No answer)

A. We don't like to have overdrafts.

Mr Clark: In dealing with men who are conducting mining operations, does the bank occasionally permit overdrafts from one cleanup to another?

A. Frequently.

Q. Had you received any information on or about the 31st—I withdraw that. When was the garnishment in the case of Rutherford and Widman against Mitchell & Co. served upon the bank, Mr Bruning?

A. My recollection is that it was in the evening of the 31st, at 8 or 9 o'clock in the evening.

Q. Where were you when the papers were served on you?

A. I think I was sitting in the front of the bank there. That was when the bank was over here. (Indicating.)

Q. When the bank was in this store in this building right across the street from the courthouse?

A. Yes, that is my recollection.

Q. Was your day's work completed at the time you were sitting there?

A. Yes.

Q. Had these entries that you speak of having been made in the books here, in the bank book crediting him up, and the charges against the account,—had they been completed at the time this garnishment was served on you?

A. The books were all locked up.

Q. Had the deposit slip for their account been made out at that time?

A. All finished for the day.

Q. Had the notes been charged against the account and set off against the account before the attachment was levied?

A. The notes and the debits had been made against the account.

Q. Was the account closed, so far as the bank was concerned, at that time?

A. It was.

Q. All that remained to be done was the physical entries in the individual ledger by the bookkeepers?

A. On the following day; yes.

Q. Did you have any idea, Mr. Bruning, that Mitchell & Co. were going to discontinue mining?

(Plaintiff objects as irrelevant, incompetent, and immaterial. Objection overruled.)

A. I did not.

Q. Did you at any time on the 31st day of July believe, or have any reason to believe, or have any information that would lead you to believe, that if these notes were charged against their account that you have spoken of that they would be unable to pay the balance of their creditors, if they had any?

A. No.

Q. You knew from the statements that they had made that they had opened up a piece of mining ground on Ester Creek?

A. I guess they were in about ten thousand dollars opening it up; it is generally considered an asset.

Mr Pratt: You are referring to their lease?

A. No, the physical opening up of a mine.

Mr Clark: Was this account of Mitchell & Co. treated any different from the way you treat other accounts with mine operators in this district, Mr Bruning?

(Plaintiff objects as irrelevant, incompetent, and immaterial. Objection overruled.)

A. No.

Q. Did you have any reason to treat it differently, or consider it any different from the ordinary miner's account?

A. No.

Mr Clark: Take the witness.

Cross-Examination, By Mr Pratt:

A. I have lived in Fairbanks since 1906 and have been in the banking business part of the time; part of

the time I was in the stage business. I have been cashier of the American Bank of Alaska since May 1910, I guess. Before that I was connected with the First National Bank for about a year and a half here in town, and out on Cleary for two seasons with the Bank of Cleary. In 1906 for a short time I was on Cleary—the winter of 1906 and 7 until May, I guess, 1908, I was with the First National, then I went back to Cleary. I was in the banking business at Cleary. For the last five years I have been cashier of the American Bank of Alaska.

Q. Well, now, that has given you an extensive experience in the relations of banks and mining operators?

A. Some would consider it so; yes.

Q. Since you have been with the American Bank of Alaska you have been its cashier, and at least when Mr Hurley wasn't in town you have been its general manager, haven't you?

A. Yes sir.

Q. When the firm of T. Mitchell & Co. commenced doing a banking business with the American Bank of Alaska in 1913, what ones of them were you acquainted with?

A. Well, I knew Mr Fallon. I don't know if I would know Mitchell if he was in the room.

Q. How is that?

A. I don't think I would remember Mitchell if he was present in the room, Mr. Fallon was the man I

knew.

Q. Did you know Fawcett?

A. No.

Q. Practically, Fallon was the only one of the firm that you knew?

A. I think he was the first one of the firm that came around to the bank to do business and opened up the account.

Q. How long had you known Fallon?

A. I think I met him here in 1905.

Q. And you have known him ever since?

A. Yes sir.

Q. He worked down at the Northern, didn't he, as bartender?

A. When I knew him first he was in the Totatlanika, mining.

Q. I ask you: while you knew him here in Fairbanks if he was not working there?

A. At one time he was working at the Northern.

Q. He was working down there in 1913 before he commenced mining?

A. I suppose so; I don't know.

Q. You knew he was working there as a bartender at and before the time he commenced mining operations out there on Ester, didn't you?

A. Yes, he had worked. He was bartender at the Northern for several years, I guess.

Q. You knew he didn't have any property to amount to anything, didn't you?

A. Well, I wasn't acquainted with his financial

condition; he always earned good wages, didn't he?

Q. When he came to the bank about banking operations with you, did you inquire of him as to what property he had?

(Defendant objects as not cross-examination. Objection overruled.)

Exc. 33.

Defendant excepts. Exception allowed.)

A. Mr Hurley was here at the time the original loan was made to Mr Fallon; it was not me.

Q. That don't answer my question. You said a while ago that Mr. Fallon was the man that came there and made arrangements about doing banking business, didn't you?

A. Yes sir. The record will show that Mr Fallon was there. Yes.

Q. Did you inquire of him?

A. I did not; Mr Hurley may have.

Q. You don't know whether he did or not?

A. I wasn't present.

Q. Fallon borrowed some money right on the start, didn't he?

A. He did.

Q. Did you know what he was going to use that money for?

A. He put it to the credit of Mitchell & Co.

Q. You knew at that time that Mitchell & Co., a firm composed of T. Mitchell, J. J. Fallon, and Herman Fawcett, were going into a mining venture out there on the Hoffman Bench, didn't you?

A. I don't know.

Q. Didn't you know that?

A. I didn't know who was in with him. All I know is that Mr Fallon made that deposit to Mitchell & Co. If Mitchell and Fallon and Fawcett were interested in a proposition—(interrupted)

Q. Didn't you know that Mitchell & Co. were going into a mining venture on Ester Creek?

A. They were mining then, I believe.

Q. Didn't you know that? Didn't they tell you so?

A. Mr Hurley made the arrangements.

Q. Didn't you know it from some source; that Mitchell & Co. were going into a mining venture, were going to do mining on the Hoffman Bench on Ester Creek?

A. It showed that Mitchell & Company were working ground on Ester creek.

Q. You knew that all the time, didn't you?

A. Yes.

Q. And you knew that the first thing that happened, Fallon came there and borrowed money, didn't you?

(Defendant objects as irrelevant, incompetent, and immaterial. The Court states that the matter has already been testified to, but allows the question to be answered.)

A. One of the notes that was charged up was probably Fallon's note, but I don't remember. I don't think it was this Fallon note here.

Q. You dont?

A. No.

Q. Fallon gave several notes there, either signed by himself or by some member of the firm there with him.

A. They gave one note there for \$850.00.

Q. That was given 'way along in July, wasn't it?

A. I don't remember.

Q. I am talking about some small notes that Fallon came there and gave you at different times, borrowing small sums of money, that were afterward taken up and put into that \$850.00 note.

A. No sir.

Q. Isn't that true?

A. No sir.

Q. Who did give those notes for the \$850.00?

A. It was Mitchell & Co. by Fallon.

Q. How many of those were there?

A. That \$850.00 note.

Q. How much were these small notes that made up that amount?

Defendant objects for the reason that the witness did not testify that there were any small notes.)

A. There was one note for \$850.00, signed "Mitchell & Company."

Q. Signed "Mitchell & Company."

A. Yes.

Q. You are sure of that?

A. That is my recollection of it.

Q. Mr Bruning, is not this true, that before they

ever started to sluice up at all, Fallon had been there and borrowed some small amounts of money and gave his notes at different times, and that afterwards those notes were taken up and put into a large one, \$850.00, and signed by Fallon & Mitchell? Examine that. (Hands a paper to witness.)

A. If the Court will excuse me, I think I can find the small notes in a small pouch at the American Bank of Alaska, of J. J. Fallon.

Q. That memorandum should refresh your recollection, I should think.

A. The memorandum says: "Note No. 622, \$850. Refund to A. Bruning to apply overdraft July 19th, \$500., and to apply on note \$154.13." That note on which the \$154.13 is applied is still in the bank.

Q. Ain't that memorandum to your bookkeeper that you are looking at now, made on the 31st, ain't that just your memorandum to him so that he would charge that all up?

A. I think so.

Q. That is what I thought, Mr. Bruning, this (referring to a paper) is dated July 8, 1913; now, ain't it true that this is simply a renewal note of some other notes?

A. No sir.

Q. Do you say that you advanced the money to Fallon, \$850.00, on July third?

A. To Mitchell & Company.

Q. On that day, on this note?

A. I think the books will show it.

Q. Answer my question. You say that you advanced to Mitchell & Co., on that note which I have just showed you, on July 3rd?

A. There are the records; that is what we keep records for.

Q. This is the same note of \$850.00 that you carried for that firm until you closed down on them on July 31st?

A. Carried it until the cleanup that was brought into the bank on July 31st. Yes.

Q. Mr Bruning, you spoke of a \$115.00 note, didn't you?

A. No.

Q. \$154.13. When was that given?

A. The note is still in the bank as part payment to apply on this note.

Q. That is another note separate from this \$850.00 note?

A. Yes sir.

Q. July 3, 1913, is when they delivered the first cleanup, wasn't it?

A. The books are there.

Q. What?

A. The books there should show.

Q. Don't you think that is about the date?

Mr Clark: Show him the book and let him testify from the book.

Mr Pratt: Where is the book?

Mr Clark: There is your own book. (Indicating bank book in evidence.)

Mr Pratt: July 3rd, 135.81 ounces at \$16.50 amount to \$1904.75. I have read that correctly. Does that refresh your memory as to when the first clean-up was brought it?

A. I suppose so. I don't pretend to memorize any banking affairs; that is what the records are for.

Q. And you tell this jury that on that date the firm of Mitchell & Co. signed up a note by James J. Fallon and Thomas Mitchell for \$850 and got the money on it?

A. Don't the books show there?

The Court: Do you desire the records to testify from?

A. Absolutely.

Mr Brown: That should be the 8th of July.

Mr Pratt: It looks like either the 3rd or the 8th.

A. The record shows here that on July 8th the firm of Mitchell & Co. was credited with the proceeds of an \$850.00 note.

Q. What were the amount of the overdrafts when that first cleanup came in?

A. \$155.14.

A. \$155.14 on the third of July.

A. No; on the third of July it was \$6.90. That is the overdraft on June 28th.

Q. June what?

A. At the end of the day's business on June 28th

the account was overdrawn \$6.90.

Q. I asked you how much it was overdrawn on the 3rd of July?

A. It was the same balance, and the note. On July 3rd at the end of the day, after all the checks were taken care of that came in at the same time as the cleanup was deposited, the balance was \$155.14 in the red at the end of the day on July 3rd.

Q. How much had they overdrawn by July 8th?

A. At the end of the day of July 7th they had an overdraft of \$795.46.

Q. Yes; now take the next day.

A. On the next day the deposit of the proceeds of the \$850.00 note put them \$18.54 to the good, a credit.

Q. What became of that \$1904.00 between those dates?

A. There is a whole list of checks; do you want me to read them off?

Q. They checked it off, checked it out?

A. I expect so, yes.

Q. They checked it all out, and by the 7th of July they were \$154.00 behind?

A. No.

Q. How much?

A. On the 7th of July they were \$795.46 behind.

Q. So they checked the nineteen hundred and four dollars out, and seven hundred and ninety-four besides?

(Defendant objects as immaterial; whereupon

another question is put to the witness.

Q. You required them to give a note to cover that overdraft at that time?

A. I did.

Q. How much were they behind? That just about squared them, didn't it?

A. Yes sir.

Q. How much were they behind at the end of the next cleanup?

(Defendant objects as immaterial, and not proper cross-examination. Objection overruled.

Exc. 34.

Defendant excepts. Exception allowed.)

A. At the end of the day on the 16th they were \$133.71 overdrawn.

Q. What was the cleanup that came in that?

A. \$2213.14.

A. And they were behind at that juncture how much?

A. They were overdrawn \$133.71.

Q. Now then, run ahead a few days?

Mr. Clark: How many days?

Mr Pratt: Run ahead a few days, to the 18th.

What was the condition of the account on that day?

(Defendant objects as immaterial. Objection overruled.

Exc. 35.

Defendant excepts. Exception allowed.)

A. At the end of the day on the 18th it shows an overdraft here of \$527.69.

Q. Take the 20th of that month, what did it show?

A. On the 19th there is a credit here; do you want that?

Q. On the 19th there is a credit of how much?

A. Proceeds of a note, \$500.00.

Q. What note was that?

A. That was a note that I put in to cover the overdraft.

Q. You just put it in?

A. Yes.

Q. How did the balance stand when that was put in?

A. They kept on checking pretty busy, and at the end of the day they were \$599.44 overdrawn after getting that credit of \$500.00.

Q. Now take the 25th; what was the state of the account?

A. On the 24th they were \$2177.14 overdrawn.

Q. Take the 28th?

A. \$2206.14 overdrawn.

Q. The 29th?

A. The same as the 28th.

Q. Did you pay any checks after that?

A. On the 30th paid a check of \$40.00

Q. That is the last check you paid, is it not?

A. Yes sir.

Q. What is the exact overdraft there?

A. \$2246.14.

Q. \$2246.14 on the 30th of July.

A. Yes.

Q. Now, Mr. Bruning, wasn't there a check of about \$400.00 presented to you by a man named McLean on that day, the 30th?

A. I don't remember,

Q. Didn't you reject a check of that amount made to McLean or someone else on that day?

A. I may, I don't remember.

Q. Don't you know that before the 31st you refused to honor any more checks?

A. I may have.

Q. You may have.

A. I don't remember.

Q. Had you made any inquiry of these men in the meantime now, up to the 31st, as to what property they had or what chance they had of paying anything outside of these mining operations?

(Defendant objects as immaterial. Objection overruled)

Exc. 36.

Defendant excepts. Exception allowed.)

A. No.

Q. You were depending altogether upon the success of that mining venture?

A. Certainly.

Q. You intended to buy this third cleanup and put it on the books and let them check it out in the usual way, just the same as you had the other two?

A. I don't know that I could answer that question that way.

Q. I ask you to answer it; answer it any way you want to.

A. I don't want this to be part of the record—

Q. Oh yes, it will be. Say what you want to say; answer it any way you want to.

A. Suppose a man had a \$5000.00 overdraft and he brought in \$4000.00 in cash to deposit, and he wanted to check \$10,000.00, I suppose I should honor \$10,000.00 worth of checks on that account?

Q. That is not my question. You intended when that third cleanup came in, to credit it on the books to Mitchell & Co., and let them check it out just as you had before, didn't you.

A. I put it to their credit the same as I would anybody's else account.

Q. You thought the cleanup would be \$8000.00, or about that, didn't you?

A. I had no idea as to what it would be; I couldn't tell. All I knew was that Mr. Fallon told me that the boxes looked good.

Q. Didn't he tell you that Mitchell & Fawcett had told him that there ought to be \$8000.00 there?

A. He may have done so; I don't know.

Q. Can't you tell as significant a thing as that, whether he told you that, that Mitchell had told him that the cleanup ought to be as much as \$8000.00?

A. He may have done so. I don't deny that he did or didn't.

Q. Isn't it true that when Fallon came in you

thought he was bringing you in a cleanup of \$8000.00?

A. I heard in the morning from Coghill that the report on Ester was that they had a \$10,000 cleanup.

Q. And you thought, until he got there with it, that it would be \$8000.00 or \$10,000.00 didn't you?

A. I had no business thinking anything until I would see the cleanup.

Q. Wasn't that all the information that you had up to the evening of the 31st of July 1913, that that cleanup that Fallon was bringing in was \$8000.00 or \$10,000.00?

A. No.

Q. Did you have any other information that it was less?

A. No, I had no information; no information on that score at all, except hearsay—what other people said.

Q. You heard what Fallon told you over the 'phone?

A. No, I don't remember of Mr. Fallon talking to me that day; he may have.

Q. You remember what Coghill told you?

A. Coghill made an offhand remark in the bank in the morning, that the report on Ester creek was that they had had a \$10,000.00 cleanup.

Q. You gave that credence?

A. What I give credence to is what I see in the book.

Q. You thought that was likely to be the truth,

didn't you?

A. No; why should I?

Q. All right. You knew, Mr. Bruning, at that time that Mitchell & Company were overdrawn with you all the time, almost every day?

A. Here are the records.

Q. Don't you know that?

A. Here are the records; they show it.

Q. Don't you know it?

A. Here are the records.

Q. Don't your records show that they were overdrawn all the time?

A. The records show that they were overdrawn most of the time.

Q. And that that overdraft kept increasing and piling up all the time?

A. That is the reason I took those means.

Q. At one time you made them give you a check of \$850.00?

A. Sure.

Q. Did you ever try to do that again?

A. No sir.

Q. You were depending, were you, on the cleanup altogether?

A. I just put the cleanup to their credit and the overdraft was wiped out.

Q. You were depending on those cleanups; that was all you had to go on?

A. Sure.

Q. You knew those three men didn't have any

property?

A. I didn't know anything about that.

Q. Didn't you know they didn't own the machinery; that they bought that on time?

A. I didn't know a thing about that.

Q. You knew at that time that there were from 30 to 50 men working there?

A. No.

Q. Didn't everyone of those checks you got show that they were for labor bills?

A. No.

Q. Look at those checks issued between the 3rd of July and the 31st of July, and I want you to answer this question: If you don't know on the 31st of July that there were a large number of workmen out there and that Mitchell & Co.'s bills were mounting up to a large sum for laborer's bills and provision bills?

A. At that time Mr Rettig was the paying teller and he paid the checks. Mr McLean was the book-keeper and he put the checks on the records. There might have been a hundred checks paid through the bank that wouldn't pass through my hands.

Q. Did you see any of those checks as they passed through the bank?

A. I don't know.

Q. Take a look of them and see what they show, every one. (Hands what appear to be checks to witness.)

A. There is nothing to show here that I saw this.

Q. Look and see if it says on those checks what they were for.

(Defendant objects as the witness testified he didn't know whether they passed through his hands or not. Objection sustained.)

Q. Didn't you know that there was a large number of working men out there?

A. I did not.

Q. Did you ever make any inquiry?

A. No sir.

Q. And you never saw those checks to make you know that they had?

A. Well, I have told you. There might have been a hundred checks that I have seen and a thousand that I haven't seen.

Q. Did anybody ever tell you that they had a large number of working men and that it cost a large amount of money for provisions?

A. No.

Q. Didn't you know it?

A. No.

Q. Did you ask them?

A. No.

Q. Just blundered along and took chances?

A. Sure.

Q. You didn't know they had any workmen working there at all, did you?

A. I didn't see anybody working there.

Q. Did you know there were any men working there?

A. It was hearsay with me that there was.

Q. Did you inquire to know how many men were working there?

A. No.

Q. Did you know of any bills they were contracting around town for mining supplies?

A. No.

Q. Did you know about them buying an engine, or something, some kind of implement from the N. C. Co. for \$2000.00?

A. No.

Q. Didn't the checks go through your bank in part payment?

A. They may have; I don't know.

Q. Where is Rettig?

A. He is in the Tolovana now.

Q. You escape that now by saying that you didn't actually look at that?

Mr Clark: We object to his trying to insult the witness.

The Court: That statement may be stricken and the jury are instructed to disregard it.

Mr Pratt: Do you testify to this jury that you didn't see any of the checks that are there on that table?

A. It is possible that I never saw one, and I may have seen them all. I don't know that I saw one.

Q. If you saw one or more than one you knew that that was for a labor debt from Mitchell & Co. to a laborer, didn't you?

A. No.

Q. Isn't it marked right on the check?

A. I don't know.

Q. Didn't I show them to you and didn't you look at them?

A. I saw some checks there; yes.

Defendant objects as immaterial. Objection overruled.

Exc. 37.

Defendant excepts. Exception allowed.)

Q. Now, Mr. Bruning you have testified that you thought that firm was all right on the evening of the 31st, didn't you?

A. In the afternoon of the 31st; yes.

Q. On the afternoon of the 31st you thought that firm was solvent.

A. Yes, to the best of my knowledge.

Q. They then owed you \$850.00 on one note, \$500.00 on another, \$154.00,—something like that—on another, and \$2100.00 or \$2200.00 overdraft, making I think about \$4096.04, wasn't it?

A. The amount of the deposit, \$3700.00 and some odd dollars—(interrupted)

Q. It amounts to more than that.

A. 15 per cent. royalty was taken out of the original amount.

Q. I am talking about how much that firm owed the bank; you know what I am talking about.

A. They owed an overdraft, \$2246.14, and the notes, were charged up, as the statement you have

got there shows.

Q. What do they amount to, \$1504.13?

A. Yes.

Q. You knew that, didn't you?

A. Certainly.

Q. Now, when that officer came in there with an attachment, you knew that the Independent Lumber Co. had a claim of \$400.00 and over, didn't you?

A. In the evening they served me with a garnishment.

Q. You knew it then, and you knew that before that Mr McLean had a check for \$400.00 that you turned down and refused to pay, didn't you?

(Defendant objects, on the ground that the witness has testified that he knew nothing about that. Objection overruled.)

Exc. 38.

Defendant excepts. Exception allowed.)

Q. Didn't you know that?

A. I told you I did not know that McLean presented a check for \$400.00.

Q. Do you remember of some people presenting Mitchell & Co. checks on the 30th, and probably in the forenoon of the 31st, that were turned down?

A. I don't remember of turning any down.

Q. Will you swear to this jury that you did not?

A. Yes, I will swear to the jury that I don't remember of turning any checks down.

Q. I am asking you will you swear that that bank

over there did not reject checks of Mitchell & Co. on the 30th and 31st?

A. Mr Rettig, as paying teller of the bank, may have, under my instructions, done so.

Q. How many checks were left there with you by people for collection?

A. I don't remember.

Q. What do you approximate the value or volume of them?

A. I don't know.

Q. About how many dollars?

A. I don't remember; I don't remember any of them.

Q. You must know that ; how many checks that Mitchell & Co. had issued and that there was no funds there to pay and you wouldn't advance any money. How many were lying right there waiting for another deposit?

A. I don't remember.

Q. Can you approximate the amount?

A. No sir.

Q. It was quite a large sum?

A. No sir. I don't know a thing about any of them.

Q. What were you doing around that bank at that time?

A. Looking wise, I suppose.

Q. You couldn't see these notes—these checks?

A. I don't remember any of them.

Q. You don't know there were some there all

right, left there for collection?

A. I don't know.

Q. Ain't that your best memory and belief, that there were some left for collection?

A. If there were any left for collection, the parties that left them would have a receipt. That would wipe it out from my mind. I don't trust to memory in banking. It is all black and white.

Q. Didn't you see them there after the 31st, lying there?

A. I don't know, I may have; I don't remember of any.

Q. Don't you suppose you could go to your bank and get them right now?

A. Send me over; I am willing to go.

Q. Don't you think they are there right now?

A. If you think so, I will go and look.

Q. You delivered them back to some of these people?

A. They may have been, I don't know.

Q. Don't you remember getting checks for collection drawn by T. Mitchell & Co., and holding them there for a time, and then delivering them back to the payees?

A. It may have been; that is what we have records for, to show it.

Q. But you can't give the amount in dollars, or any approximation of the amount of those checks that were left there for collection?

A. I don't remember a single one even being left

there.

Q. But you have said it was your best impression that there were some.

A. No, I didn't say that.

Q. I thought you did.

Q. Now, there is one thing you happen to say you know about, and that was that garnishment for \$400.00 of the Independent Lumber Co. You have to admit that?

A. I don't remember the amount; I remember being served with a garnishment.

Q. And you say that didn't make any difference with you?

A. No.

Q. No. That was just nothing. So, before that, however, Fallon had come in with this gold dust, hadn't he?

A. Yes.

Q. And you had weighed it out?

A. Hopkins had weighed it, I believe.

Q. That was all done in a little bit after Fallon got in there?

A. No.

Q. Half an hour?

A. It might have been more than that.

Q. An hour?

A. I told you that it required a good deal of cleaning.

Q. Answer me; was that done in an hour from the time Fallon got there?

A. I don't know.

Q. An hour and a half?

A. It might have been done in five hours for all I care.

Q. Don't you know that Fallon came in from the train right over there with that gold dust?

A. I suppose he did.

Q. Give your best estimate of how long it before that gold dust was cleaned up so that you would know exactly what its value was.

A. I might bring Hopkins up here and he might remember. Hopkins handled the gold dust. All the transaction took place before six o'clock that night. If he got there at four it might have been an hour and a half.

Q. You are sure the whole thing happened, and it was all cleaned up and the amount ascertained before six o'clock?

A. Yes sir.

Q. And just as soon as you got it ascertained, you set it off against the notes and overdraft.

A. As soon as I made out the deposit slip, so that I knew how much the cleanup amounted to, I charged up the notes, as that slip shows.

Q. You made the setoff right then and there?

A. Certainly I did.

Q. Before six o'clock?

A. As soon as—(interrupted)

Q. (continuing)—on the evening of July 31st, 1913?

A. Yes sir.

Q. When Fallon came in, did you tell him or intimate to him that you were going to do that?

A. Yes sir.

Q. Did you tell him that?

A. Yes sir.

Q. That evening?

A. Yes sir.

Q. Mr Bruning, stop and think. Isn't this true; that you never said a word to him about that until the next morning about nine—between nine and ten o'clock—when he went there; that that is the time you told him you had done it?

A. No; my recollection is that I told him in the evening.

Q. Isn't it true that you told him that the next morning between 9 and 10 o'clock for the first time?

A. My recollection is that when Hopkins and Rettig were cleaning the dust that I told him that I—
(interrupted)

Q. Who was there to hear that?

A. I was there, and he was there, I guess.

Q. Paul Hopkins was there?

A. They were not there when I was talking to Mr Fallon.

Q. They didn't hear that?

A. They were in the other room.

Q. Will you deny before this jury this; that the first time you told Fallon that you had set that clean-up off against the indebtedness of Fallon & Co. was

the next morning between 9 and 10 o'clock, on August 1st?

A. I state that the evening or the afternoon that the gold dust was delivered at the bank and the boys were cleaning the dust, that I told Mr Fallon that their overdraft amounted to so much on the ledger; that I would place the cleanup to their credit as soon as I ascertained what the amount was, and that I would charge the demand notes in the bank against the account.

Q. Are you sure you told him that evening?

A. I am sure; that is what I am saying, that I am sure of it.

Q. You are sure you told him that evening?

A. I am, yes.

Q. You are sure it didn't occur the first time the next morning?

A. I am sure I told him that evening—that afternoon.

Q. That very thing?

A. Yes sir.

Q. You told him you were going to set that off against the overdraft?

A. No.

Q. And the demand note?

A. I told him I would place the proceeds to their credit,—that would naturally wipe out the overdraft,—and charge them up with the notes. I told him the overdraft amounted to so much. I didn't say I was going to set it off against the overdraft at all. I told

him I would put that amount to their credit— that would naturally wipe off the overdraft—and I would charge them up with the demand notes.

Q. And you deny that that conversation occurred on the next morning and didn't occur on the evening of the 31st?

A. I say that occurred in the afternoon of the day that the gold dust was delivered.

Q. Do you remember the conversation that you had with Mr Fallon the next morning just before the bank opened?

A. I don't remember him being in the bank the next morning.

Q. Didn't he come in there between 9 and 10 o'clock, and didn't you then tell him that you would set that off against the indebtedness of Mitchell & Co., and didn't he then tell you that he had issued a lot of checks out on Ester Creek before he came in?

A. I don't remember.

Q. Didn't he tell you about issuing a lot of checks out at Cleary City? (Evidently means Ester instead of Cleary.)

A. Not as I remember.

Q. Did he tell you that the evening before this, when you told him you were going to set this off?

A. I don't think he told me that then.

Q. Don't you know that he told you that point-blank in the morning of August 1st in that bank?

A. If he had told me it wouldn't make any difference so far as I was concerned.

Q. Didn't he tell you that that meant that they would have to close down?

A. No sir.

Q. That they had issued a lot of checks out there to the men in a large sum of money?

A. No sir.

Q. Will you swear positively that he didn't?

A. To the best of my recollection he didn't.

Q. To the best of my recollection he didn't?

A. Yes, he didn't.

Q. You knew that when you took that money all these other claimants out here, these laborers and those who had furnished provisions and wood and everything, wouldn't get anything?

A. Judge, you understand they had gotten the benefit of that cleanup before it got to the bank. The checks were honored before even the deposit was made. It was upon the representation that that cleanup would come to the bank that I honored those checks and allowed them the overdraft.

Q. And when the cleanup showed only \$3734.00, then you concluded you would not advance any more money.

A. Yes. Do you suppose I was supposed to advance about \$5000.00 more?

Q. Didn't you make up your mind that you wouldn't cash any more over-checks when you saw that cleanup of \$3734.00?

A. No, I made up my mind when I was served

with the garnishment; then I made up my mind that I wouldn't—(interrupted)

Q. Wait. You told this jury that you did all this before six o'clock—(interrupted)

Mr Clark: Let him finish his answer.

The Court: Finish your answer.

Mr Pratt: Didn't you tell this jury a while ago that that was all finished before six o'clock?

The Court: You may finish your answer, if you have not finished it.

(Question and answer read as follows: .Q. Didn't you make up your mind that you wouldn't cash any over-checks when you saw that cleanup of \$3734.00?

A. No, I made up my mind when I was served with the garnishment; then I made up my mind that I wouldn't—)

A. (continuing—that I wouldn't cash any more checks or allow any more overdrafts.

Mr Pratt: Haven't you told the jury here distinctly that that setoff was made and the whole thing closed up prior to 6 o'clock that evening?

A. Yes, but you asked me if I wanted to pay any more checks.

Q. Didn't you tell—I asked you if you hadn't made up your mind by 6 o'clock to do that, and you have tried to say no, that you didn't make up your mind when the garnishment was served.

Mr Clark: He didn't testify to that at all.

Mr Pratt: Yes, he did.

The Court: You have been talking about two dif-

ferent things; one is about overdrafts and the other is about the time when the setoff was made.

Mr Pratt: Didn't you say a while ago that that set-off was all accomplished prior to 6 o'clock on the evening of the 31st of July 1913, didn't you so testify?

A. I have told you and will tell it again; that we made the credit as soon as the dust was weighed, and right after that I charged up the notes.

Q. That was before 6 o'clock?

A. That was before 6 o'clock.

Q. And from that time on you didn't intend to cash any more checks for Mitchell & Co.?

A. Then you said that Mr Fallon told me that he had issued checks for large amounts.

Q. You are talking about something else.

A. No; you asked me that; you said that Fallon came in and said he had issued checks for large amounts to the workmen and others; and, according to your idea, I suppose I should go on cashing them even with a small cleanup.

Q. You now want to tell the jury that you didn't make up your mind to make that setoff and not cash any more checks until that attachment was served.

A. No, I said I made up my mind not to allow any more overdrafts when that attachment was served.

Q. Ain't that what I have been talking about?

A. I don't know what you are talking about.

Q. I tried to get you to tell when it was that you

made up your mind that you wouldn't cash any more checks of T. Mitchell & Co,—overchecks. That was 6 o'clock, was it?

A. No.

Q. When was it?

A. I told you after the garnishment. The testimony will show that I was garnisheed about 8 or 9 o'clock.

Q. Then you made up your mind for a certainty that you wouldn't cash any more checks if they were overchecks?

A. Certainly.

Q. You knew then that Mitchell & Co. didn't have anything on file?

A. I knew they had nothing to their credit.

Q. That meant that you were not going to cash checks at all?

A. As long as I wasn't allowing any overdraft.

Q. Why wouldn't you cash any more checks for them?

A. Because when a house is on fire I am not going to place insurance.

Q. You knew the house was on fire at that time?

A. Certainly. When a man jumps another with an attachment, it is about time to keep hands off.

Q. You knew at 6 o'clock that your house was on fire, didn't you?

A. I did not.

Q. You didn't think so?

A. No sir.

Q. You didn't know that there were men out there working, with big bills to come in, did you?

A. I didn't know a thing about it.

Q. You didn't know men had been coming there, a number of them, for a couple of days before that, trying to get checks cashed, and you wouldn't cash them?

Mr Clark: We object to those statements as absolutely contrary to the evidence.

The Court: Objection sustained.

A. I wasn't out there around the mine; I was trying to run our business.

Q. The next morning at 10 o'clock, when your bank opened, checks were offered then for payment, were they not?

A. I suppose so.

Q. You are not sure about that?

A. Mr Rettig was paying teller; I wasn't up to the window all the time.

Q. Don't you know that Mitchell & Co. checks came in there, running into several thousand dollars within a few days?

A. They may have.

Q. Don't you know it?

A. No.

Q. What were you doing there?

A. I was looking after the business of the bank. I was not keeping account of all checks that were presented and turned down, and things like that; we don't keep any record of that at all.

Q. How far were you sitting away from the paying teller?

A. I suppose I was pretty busy. Do you suppose I have nothing else to do but stay there and watch the paying teller to see what he is doing?

Q. In day time you walk over there frequently?

A. You have been in the bank often enough to see what I do.

Q. You remain there in daytime looking after that business and seeing that the business is transacted?

A. I see that the boys do their work.

Q. You knew from your supervision and inspection that checks of Mitchell & Co. in a large amount were offered there to be cashed within a few days after that, didn't you?

A. I know that in any business that pertains to the bank I invariably depend upon the records, black and white, and not upon memory. That is the first lesson that a man gets, not to depend upon memory. If there is anything like that that took place in the bank, the records will show.

Q. Now, you want to tell this jury that you would have a record of a man bringing in a check in there and offering it, and you wouldn't pay it?

A. The man would have the check marked "Not sufficient funds". We don't keep any record of that.

Q. You hand it right back to him?

A. Yes.

Q. Don't you know there is no record of that?

A. If the man don't keep the record it is not up to the bank to keep the record in that respect.

Q. Mr Bruning, ain't this true, that when a check is presented there to Mr Rettig, the assistant cashier, and he is in doubt about whether it should be honored or not, don't he delegate it all to you?

A. He probably would ask me: "Will I pay this check?"

Q. Didn't you instruct him, when the bank opened on August 1st, 1913, not to pay any more of the T. Mitchell & Co. checks?

A. Very likely I did?

Q. Don't you know you did?

A. I suppose I did.

Q. You never paid any more of them after that, did you?

A. I don't think we did.

Q. Isn't it true that that money, or the sum of money that represents that gold dust, from 6 o'clock in the evening of July 31, 1913, that that sum of money was never at any time subject to check of T. Mitchell & Co. Isn't that true?

(Defendants objects as immaterial. Objection sustained.)

Mr Pratt: I want to know if that money was deposited in your bank subject to the check of T. Mitchell & Co. at any time; was it deposited there, I mean subject to check at any time after 6 or 8 o'clock in the evening of July 31st, 1913?

(Defendants objects, and the Court rules that the witness need not answer until Mr Pratt explains what he means by 'deposited subject to check').

Q. I mean a fund in your bank that if the depositor should issue a check and somebody should go there with it, that you would pay it. . . .

A. If there is a balance to their credit we will pay it.

Mr Pratt: Ain't that a fair question and a fair understanding?

Mr Clark: That is a fair understanding.

Mr Pratt: Now, was that sum of money subject to check, in the ordinary way of business now of banking, by T. Mitchell & Co. at any time after 6 or 8 o'clock in the evening of July 21, 1913? That is a fair question. Now, answer that, whether it was or not.

A. It was a checking account like all other accounts, and checks will be honored against an account, where there is a balance, or if there is an arrangement for an overdraft.

Q. You call that an answer, do you?

A. Yes.

Q. It just don't answer anything. Would your bank have cashed a check of T. Mitchell & Co. at any time after the hour that I have named?

A. Not after 9 o'clock at night. No.

Q. Would you the next day?

A. No.

Q. Therefore, Mitchell & Co. didn't have any de-

posit subject to check after 6 or 8 o'clock in the evening of July 31, 1913, did they?

(Defendant objects as incompetent, and is apparently an attempt to show that it was not a deposit made in the ordinary course of business the same as all other deposits are made. The Court sustains the objection on the ground that the question has been heretofore answered.)

Q. Mr Bruning, Fallon got in after the train, didn't he, on the evening of July 31st?

A. That has been testified to.

Q. He got in that evening?

A. I suppose so.

Q. And he came right over to the bank?

A. I think so; he may have stopped on the way and taken a drink; I don't know.

Q. In a very short time you had ascertained that the cleanup was \$3734 and some cents?

(Defendant objects as having been gone into several times. The Court allows witness to answer.)

Q. You had ascertained the value of that, as I understood you, before 6 o'clock?

A. Yes.

Q. And you had in fact set it all off against the indebtedness of T. Mitchell & Co. prior to 6 o'clock?

A. I put the proceeds to their credit and charged up those notes before 6 o'clock.

Q. That means you set it off before that?

A. I don't know what you mean; that is what we did.

Q. Had you in the meantime consulted your attorney?

A. No sir, I didn't need any consultation.

Q. Did you during that evening?

A. No sir.

Q. Now, the bank books here show a deposit on August 1st, dont they?

A. The individual ledger shows it as entered on August 1st.

Q. Does this pass book? (Hands book to witness.)

A. That shows it as on the 31st there.

Q. How much was this firm in the red in your book, if you extended this book on the evening that you made this setoff, how much in dollars?

(Defendant objects as heretofore testified to. The Court directs Mr Pratt to hand the book to the witness, so as to enable him to make the calculation, and Mr Pratt hands said book to the witness.)

A. What is it you want to know?

Q. How much was that firm in the red on the evening of the 31st?

A. On the afternoon of July 30th, as well as upon the 31st, at 3 o'clock, when the bank closed, they were overdrawn \$2246.14. Between 3 and 6 o'clock they made a deposit of this amount of gold dust, which was put to their credit, and that wiped out the overdraft and left a balance which was charged up to the notes of \$850.00, \$500.00, and what that other item is.

Q. When did you put those notes on that running account, just as though it was a checking account?

A. As soon as the credit had been placed, that is, when the gold dust slip had been given to me, I made out the deposit slip. I ascertained how much the deposit amounted to above the overdraft, and I went to work and applied the surplus on those notes; that is, I charged the notes, treated them the same as a check; charged the notes against the account.

Q. The amount was \$4690.00—(interrupted)

A. It is \$1504.00.

Q. I mean the whole of the aggregate of the overchecks was \$4896.00?

A. No. Thirty seven hundred and—(interrupted)

Q. I am talking about the debt of T. Mitchell & Co.—the whole debt, that is.

A. I am talking about the \$2246.14 overdraft, and the \$1500.00 and some odd dollars that was applied on the notes. That don't make over thirty seven hundred and some odd dollars.

Q. There must have been more; you got it to \$4096.00.

A. I never got any \$4096.00.

Mr Brown: They are talking about different things.

A. The royalty went to Hoffman, 15 per cent. of the whole amount.

Q. Mr Pratt wants to know how much Mitchell & Co. owed the bank after the application was made.

Mr Pratt: Well, how much do Mitchell & Co. owe the bank?

A. Between the notes and overdraft and all?

Q. Yes, put them all together.

A. There are some notes in the bank there yet.

The Court: Do you know what the amount is?

A. No, I do not.

Q. You don't know at this time how much Mitchell & Co. owe the bank?

A. Yet? No.

Mr Pratt: Have you that bank book there?

A. Yes.

Q. If that book had been extended, and showed these entries in the red, it would show something like \$4000.00 at the time you made this setoff?

A. No; it wouldn't show any \$4000.00 in the red. If I had kept on honoring checks and paying checks it might have been ten thousand dollars in the red; I don't know anything about that.

Q. If you treated these notes the same as checks—the checks are \$2200.00 and something?

A. Yes.

Q. And the notes run into that would run it up to about \$4006.00?

A. No. It couldn't be possible, for the simple reason that a note is a debt. If I wipe out a note it would create another debt.

Q. You told the jury that you took the notes and treated them as a check?

A. As a check, against the balance that was left after the overdraft was wiped out by the deposit.

Q. You know a man by the name of Tony Liongavich?

A. No.

Q. I show you that check. (Hands same to witness). See if that refreshes your memory. See if you remember of that man presenting that check to the bank?

A. I don't remember him at all.

Q. That was about 10 o'clock. That was just as soon as the bank opened on the first day of August 1913.

A. I don't know anything about that.

Q. That don't refresh your memory. Now, didn't this man Liongavich come there about 10 o'clock and present this check, and didn't you tell him that you wouldn't pay it because the bank account of Mitchell & Co. had been attached?

A. I don't remember.

Q. You might have told him that?

A. Yes, or somebody else might have told him; I don't know.

Q. Can you give us an idea, in minutes and hours, whatever it is, of the time that elapsed between the time that you ascertained the value of that gold dust and the time that you made the setoff?

A. Well, all transactions between the purchase of the gold dust and the crediting on the ledger was done between 6 o'clock that night.

Q. You don't answer my question. How much time elapsed, minutes?

A. If he got in at 4 o'clock or half past 4, it would have been an hour and a half. I don't know.

Q. You know when the train came in?

A. No, I don't.

Q. Don't you know the train came in that time at 5 o'clock?

A. I don't know.

Q. You don't remember?

A. No.

Q. As a matter of fact, it was done immediately. As soon as you ascertained the value, you made the setoff?

A. As soon as the dust was cleaned and the clean dust weighed and the deposit made, as I told you, the setoff was made.

Q. And that setoff was made with reference to everything that T. Mitchell & Co. owned, notes and overchecks?

A. It was all Mitchell & Co. owed that was charged against that.

Q. This small book shows that the deposit, as you call it, was made that evening, the evening of the 31st?

A. The afternoon of the 31st. Yes.

Q. Did you have his book there—Mr Fallon's book there?

A. I don't remember.

Q. You don't remember whether he handed it in?

A. The entry in the book is made by the book-keeper. He might not have made that until the day that the book was balanced. I don't know.

Q. You don't remember whether Fallon handed the book in with the gold dust?

A. I don't remember; no.

Q. Well, now, what paper is it that you rely on there in that bank to show you when a transaction takes place; the pass book of the depositor or this sheet? (indicating).

A. That is the individual ledger. It shows all deposits and all checks, all transactions a depositor may have with a bank.

Q. Which do you rely on for your own guidance? You were talking about records a while ago. What do you, as a banking man, rely on over there?

A. I refer to any records; some are teller's checks, some are depositor's checks, some pass books, and some twenty-dollar gold-pieces.

Q. Deposits all go on this sheet?

A. If a man makes a deposit to a checking account. Yes.

Q. If you have charged up the overdrafts as you call them—(interrupted)

A. We don't charge up any overdrafts; no charging to be done there.

Q. Not on this paper?

A. We don't charge any overdrafts. No. You

charge the checks and the checks create the overdraft, but you don't charge the overdraft.

Q. You charge the checks on this paper?

A. Yes; we do.

Q. Did you charge these notes the same as checks on this paper?

A. Yes sir.

Q. And you made a record here of when the set-off took place, didn't you?

A. The record shows when the deposit was made, on the individual ledger.

Q. I ask you to look at that paper and see if that does not show a deposit on the 31st, the same as that small book, and a setoff the next day, on the 2nd?

A. A deposit shows here, entered here on August 1st of \$3734.12.

Q. When was the setoff created?

A. There was an entry made here—(interrupted)

Q. When is the setoff said to have been placed upon that paper; don't it show August 2nd?

A. It shows \$1485.00 on August 1st.

Q. On August 1st?

A. Yes.

Q. What is that other data there of August 2nd?

Q. Nineteen thirteen was on August 2nd.

Q. What is that nineteen thirteen?

A. That is the difference between what the gold dust brought at \$16.40 and what it went better after the assay. The gold was purchased at the rate of \$16.40 an ounce, with the understanding that if upon

an assay it went better than \$16.40—because you never can clean it down fine enough—that they would get the benefit of that credit; if, however, it did not go \$16.40 the bank would sustain a loss.

Q. Can you tell, by that sheet of paper, when that setoff was made, took place?

A. The notes were charged on this individual ledger account on August 1st.

Q. When was the other?

A. The nineteen thirteen was August 2nd.

Q. As a matter of fact that had all been paid by this deposit the evening before?

A. No, no; well, to a certain extent, yes. Not the nineteen thirteen.

Q. That is, nineteen dollars—(interrupted)

A. Yes.

Q. All except that?

A. Yes.

Mr Pratt: We offer this in evidence.

(Defendant objects to its being introduced in evidence as it is a part of the bank's records, and was not offered in evidence by defendants, but merely used as a memorandum to refresh the recollection of the witness. It is an original page of the looseleaf ledger. Agreed that it may be withdrawn at the close of the case, if admitted in evidence, and defendant offers no objection to its introduction, if it can be so withdrawn. Whereupon it is admitted in evidence and marked as "Plaintiff's Exhibit M.", which exhibit is as follows:)

Average Daily Balance

Name MITCHELL & CO.

For Days \$ THOMAS MITCHELL Address Per JAMES J. FALLON EVA CREEK

	DATE 1913.	MEMORANDUM	TOTAL CHECKS	DEPOSITS	BALANCE	DATE 1913	MEMORANDUM	TOTAL CHECKS	DEPOSITS	BALANCE
	June 11			200.	200.	18	20. 40.50 43. 300.			
	16	20	20		180.					
	19	74.75 100.	174.75	100.	105.25			503.50		527.69
	23		67.15		38.10	19	70. 124.90 88. 40. 21.60 40. 12. 140. 35.25		500	
	26	20	20.		18.10					
	28		25.		6.90			571.75		599.44
	July 3	22.87 126.90 5. 5. 110. 25.82 110.90 84. 15.				19	14.75 200.	214.75		814.19
						21	17.50 125. 80. 200.	22.50		1236.69
			505.29			21	6. 60. 25. 127.50 21.75 30. 10.			1516.94
	3	88.30 18.50 469.50				23	46. 75. 25. 30. 47.25 13.20 74.25 82.50 140.	280.25		
		83.40 200. 75. 100. 100. 100.	584.30							
135.81 at 16.50		8. 100. 200.	658.40							
	4	10. 25. 54.25 84.87 47.80 133.65 10. 10.	305.	1204.75	155.14	24	106. 9.	115.		2030.14
						24		32.		2145.14
			375.57		530.71	26	5.	5.		2177.14
	5	69.17 10. 173.25 50. 65.				28		24.		2182.14
			367.42		898.13	30		49.		2206.14
	7	30. 32.52	62.52	185.19	795.46	85 pct. 267.87 at 16.40. Aug. 1		1485.	3734.12	2.98
	8	5. 31.	36.	850.	18.54	Bal. \$22772		19.13	16.15	0.
	9	26. 10.	30		11.46			67 cks short 8-2-13.		
	10	15. 2.50	17.50		28.96	Aug. 16	2.55 acct 16.50 Black Sand	49		49.
85 pct.-157.80 at 16.50	15	29.25 50.50	79.75	51 cks. 7-16-13.	108.71	Sept. 24		49.		0.
	16	24. 12.50 200. 200. 32.50 52.50 20. 119. 29.25 57.50 30. 308.50 85. 49.50 75. 20.	25.	2213.14.	133.71					
	17		2013.62		55.81 24.19					

(Endorsed: "No 2011. Pltfs Exhibit M., Geo. Johnson Trustee Plaintiff vs. Am. Bk of Alaska Defendant." "Filed in the District Court Territory of Alaska, 4th Div. Nov. 2 1915 J. E. Clark Clerk by Sidney Stewart Deputy.")

Mr. Bruning, when that cleanup was delivered there to you, now, you knew and believed that that was all the gold dust that was gotten at that cleanup, did you not?

A. I supposed so.

Q. You thought so, and you knew and believed that if you took that they would have to close business?

A. No sir.

Q. You didn't?

A. No sir.

Q. Didn't Fallon tell you so?

A. No sir.

Q. Have I asked you anything about a conversation with Herman Fawcett, one of these partners, on the evening of the 31st? Do you remember him coming in there?

A. I don't remember him at all.

Q. Do you remember of him coming in and asking you if that gold dust was subject to be attached; that a man by the name of Nelson had a claim of \$1000.00?

A. He may have come in there; I don't remember if he did. Is Fawcett in the room here?

Q. You heard from some source that evening that Nelson was threatening an attachment on a \$1000.00 claim?

A. All I have any recollection of is being served with a garnishment in that Rutherford matter.

Q. You go right off onto something else.

Mr Clark: He has answered the question.

Mr Pratt: He has not; you don't answer it at all. Didn't you hear that evening from Herman Fawcett or from somebody else, or from some source, that a man by the name of Nelson was threatening to bring an attachment action to try and seize that same gold dust on a claim of \$1000.00 against T. Mitchell & Co.?

A. To the best of my recollection, no.

Q. You don't want to be any too positive about that?

A. I am positive to the best of my recollection.

Q. Have you testified that that leaf that is introduced in evidence, what that is from?

The Court: What is that question? .

Mr Pratt: I ask Mr Bruning what is that leaf, out of what book?

A. Individual ledger account.

Q. The daily transactions with individuals—(interrupted)

A. Yes sir.

Q. —are entered there, are they not?

A. Yes sir.

Q. Supposed to be in full?

A. Yes.

Q. Is that the record you consult, Mr Bruning, when you want to inquire whether a check of a particular individual ought to be honored?

A. Certainly.

Mr Pratt: That it all.

Redirect Examination, By Mr Clark.

Q. Did I understand from your statement a while ago that so far as the bookkeeper's entries are concerned, his day closes at 3 o'clock

A. It does; yes sir.

Q. And any transaction that the bank has after 3 o'clock is entered under date of the next day's business?

A. Yes sir.

Mr Clark: That is all.

Defendant Rests.

JAMES J. FALLON, called in rebuttal for plaintiff, heretofore sworn, testified as follows:

Direct Examination, By Mr Pratt.

Q. Mr Fallon, will you state to this jury when it was that you first learned from Mr Bruning that he had a setoff to the amount of the value of that clean-up against the indebtedness of T. Mitchell & Co.

(Defendant objects as already testified about. Objection overruled.

Exc. 39.

Defendant excepts. Exception allowed.)

A. That was the morning of August 1st when I went in there, the morning of August 1st. I remember Mr Bruning talking. He had been waiting on a customer that was in the bank, and Mr Hopkins was behind on the scales. I had the poke. Mr Fawcett was in there—(interrupted)

(Defendant moves that the answer be stricken out

as not responsive, the latter part of the answer. Objection overruled.

Exc. 40.

Defendant excepts. Exception allowed.)

A. (continuing)—and I remember Mr Bruning saying something. And I had been so excited over the day's proceedings of the man getting killed, and so on, and the smallness of the cleanup, that I remember distinctly Mr Bruning saying: "Hello, there, Jim," and saying something else, I suppose it was pertaining to the cleanup. I think he said: "How is the cleanup? Have you got a big cleanup?" or something like that. And I said: "No, not so big as we thought it was." With that Mr Hopkins was ready to wait on me and I gave him the dust over. And I called back there that evening,—I think it was probably three-quarters of an hour afterwards, or so, between that and 7 o'clock, or so,—and they were busy doing something there, and Mr Hopkins said he had not finished the cleaning of it up. He couldn't blow it on account of the coroner's jury being out there, and we were all busy and didn't have time to blow it—(interrupted)

(Defendant moves that the answer be stricken out as not responsive.)

The Court: I do not know what he intends to state. He was talking about the 1st of August, when he came back to July 31st.

Mr Pratt: Was there anything said to you upon the evening of the 31st, by Bruning or anybody else

in that bank, that the value of that cleanup had been set off against the firm debts?

A. Not to my knowledge.

Q. When was it first?

A. On the 1st of August in the morning.

Q. Are you sure of that?

A. I am pretty certain of it.

Q. What had you expected and intended to do from the time you got in to the bank with the cleanup in the evening and the time you talked to Mr Bruning the next morning?

(Defendant objects as not rebuttal, and asking for his speculation, expectation, and what he intended to do. Objection sustained.)

Q. State when it was that you notified Mr Bruning that if the checks of that firm would not be honored that you would have to shut down?

(Defendant objects as assuming that something has been testified to that is not in evidence. Objection overruled.)

Exc. 41.

Defendant excepts. Exception allowed.)

A. Well, Judge Pratt, those words never came out of my mouth in my testimony, about me shutting down.

Q. Some different words then?

A. No sir.

Mr Pratt: That is all.

Cross-Examination, By Mr Clark.

Q. There was an accident, a man was killed, out

at your works that day?

A. Yes sir.

Q. And the cleanup you had was not cleaned up very clean on that account?

A. It was not.

Q. And you were a little bit excited when you came into town?

A. Yes, everyone was excited.

Mr Clark: That is all.

Mr Pratt: That is all.

Mr. Marquam: We rest.

Mr Clark: We rest.

Testimony closed.

That thereafter, and before the arguments of attorneys or the instructions of the Court, the defendant made the following motion, to wit:

MR CLARK: At this time we ask the Court for a directed verdict, and move the Court for an order, directing the jury to bring in a verdict in favor of the defendant and against the plaintiff in this action, upon the ground and for the reason that there has been an absolute failure of proof on the part of the plaintiff of the things necessary to be proven to entitle them to a verdict in this case, and, on the contrary, the evidence clearly shows that the set-off made by the defendant bank in this action is a set-off of over-due notes held by said bank, against the credit standing in said bank to the general deposit account of the firm of T. Mitchell & Company, and

that the bank had a perfect right to make such set-off; and for the further reason that the evidence conclusively shows that the defendant had no knowledge, information, and had no reasonable cause to know or believe that, by receiving moneys upon the deposit made by T. Mitchell & Company, that it would secure a preference; and for the further reason that the evidence conclusively shows that the bank had no knowledge or information, or cause to believe, that the firm of T. Mitchell & Company were insolvent at the time said set-off was made and effected. And we ask the Court at this time to direct the jury to bring in a verdict in favor of the defendant and against the plaintiff in this action.

Which said motion was denied by the Court; to which defendant then and there excepted, and said exception was allowed.

Exc. 42.

That thereafter said cause was argued to the jury by counsel for the respective parties, and thereupon the Court instructed said jury as follows:

Gentlemen of the Jury:

I.

You are instructed that in this case the Judge and Jury have separate, though important, functions to perform. It is your duty to weigh and consider the evidence in the case, all of which is addressed to you. It is the duty of the Judge of this Court to instruct you as to the law in the case, and you are required

to accept as the law what is given you as such by the Court, and upon the law and the evidence to render a just and true verdict as you have sworn to do.

Your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find a verdict in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a less number, or against a presumption, or other evidence, satisfying to your minds.

You are instructed that a witness willfully false in one part of his testimony may be distrusted in others. It is your duty to determine what is the truth of the testimony presented, and upon the facts of the case to render a verdict accordingly.

In civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of the evidence.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant, he can not recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your minds. That is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant. The plaintiff can only

recover where his testimony outweighs that of the defendant.

You are instructed that evidence is to be estimated not only by its own intrinsic worth, but also according to the evidence which it is within the power of one side to produce and of the other to contradict, and, therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering the same, the evidence so offered should be viewed with distrust.

You are the exclusive judges of the facts proven, of the credibility of the witnesses and the weight to be attached to their testimony.

In making up your verdict, you should not take into consideration any evidence sought to be introduced but excluded by the Court, or any evidence stricken by the Court from the record, neither should you permit the remarks or expressions of counsel to influence you in arriving at a verdict, unless such remarks or expressions are based upon the evidence in the case or are reasonably inferred therefrom.

2

In this case affirmative issues are presented by the plaintiff in his complaint, and, where the same are denied by the defendant, the affirmative allegations must be proven by the plaintiff by a fair preponderance of the evidence. An allegation in the complaint not denied is considered to be admitted, and proof thereof will not be required. If, however, in addi-

tion to denying such affirmative allegations, the defendant sets up an affirmative defense, the burden of proving such affirmative matter rests upon the defendant to establish the same by a fair preponderance of the evidence, if the same is denied by the plaintiff in his reply.

3

A copartnership is a voluntary contract between two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of profits thereof between them.

4

A depositor is one who pays money into a bank to be placed to his credit and to be subject to his check.

5

A general bank deposit is different from an ordinary debt in this: that from its very nature it is constantly subject to the check of the depositor, and is always payable on demand.

6

You are instructed that when a deposit is received after banking hours, and it is entered like other deposits, the debtor and creditor relation is created.

7

You are instructed that a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for, when he parts with the

money, he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security.

8

You are instructed that, in considering whether or not a deposit in the general account of T. Mitchell & Company was made in the defendant bank on the afternoon of July 31st, 1913, you have a right to consider all the circumstances connected with the transaction.

9

A bank deposit and a note of a depositor held by a bank are mutual debts which are subject to be set off against each other under section 68 of the National Bankruptcy Act, and the set-off by such bank of the amount of the deposit against the amount due on the note is not a transfer of property by the bankrupt as contemplated by the National Bankruptcy Act, and such set-off, if made in good faith, does not give a preference within the purview of section 60 of the National Bankruptcy Act even if the set-off is made within four months before the filing of the petition in bankruptcy.

10

The Court instructs the jury that the word "insolvent" as used in the pleadings in this case, means that on the 31st day of July, 1913, the aggregate of

all the property belonging to the copartnership firm of T. Mitchell & Co., and that of T. Mitchell, J. J. Fallon, and Herman Fawcett, the individuals composing such firm, was not sufficient at a fair valuation to pay the debts of such copartnership firm.

The phrase "reasonable cause to believe the transfer would effect a preference" means, as applied to the pleadings and evidence in this case, that at the time of such set-off by the defendant bank, some one or more of its officers had knowledge concerning the financial affairs of said copartnership firm of T. Mitchell & Co., sufficient to induce the belief in their minds of the insolvency of said firm, and that such set-off would effect a preference in its favor over other creditors. Actual knowledge of insolvency and that the set-off would enable the bank to get a greater percentage of its debt than other creditors of the same class might or could get, is not necessary or required under the bankruptcy law, but "reasonable cause to believe" such insolvency and preference is all that the plaintiff is bound to establish by a preponderance of the evidence.

11

I instruct you that the burden is on the plaintiff in this action to prove by a preponderance of the evidence every essential fact necessary to constitute his cause of action, and if you find that the evidence introduced by the plaintiff to prove any of the material allegations of his complaint merely creates a suspicion or doubt in your minds but does not satisfy

your minds by a preponderance of evidence, then you are to disregard said evidence if unsupported by evidence that does produce conviction; and I further instruct you that a transfer can not be avoided simply on proof that the creditor had doubt or suspicion that a preference was intended, for it is not enough that the creditor has some cause to suspect the insolvency of the debtor, but he must have such knowledge of fact as to induce a reasonable belief of his debtor's insolvency. And if the evidence introduced by the plaintiff in regard to knowledge or information possessed by the defendant shows that the defendant in this action may have had some suspicion in regard to the insolvency of T. Mitchell & Company, but that it did not have any reasonable cause to believe that the deposit made by said T. Mitchell & Company, if you find that such a deposit was so made by said T. Mitchell & Company, would effect a preference in favor of said bank, then I instruct you that your verdict must be for the defendant.

12

A preference consists in a person (1) while insolvent and (2) within four months of the bankruptcy, (3) procuring or making a transfer of his property, (4) the effect of which will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class. Such a preference is voidable at the instance of the trustee if (5) the person recovering it or to

be benefited thereby has '(6) reasonable cause to believe that the transfer will result in a preference.

The burden of proving the existence of the essential elements of a transfer is upon the trustee seeking to avoid it, and in the case at bar unless the plaintiffs in this action have proven each and every one of the essential elements above set forth, by a preponderance of the evidence, then your verdict must be for the defendant.

The term property is a comprehensive term, and as used herein is broad enough to include money, gold dust, or anything of value.

13

If the jury finds from the evidence that on the 31st of July, 1913, the firm of T. Mitchell & Company did not make a deposit subject to check as herein-after defined to you in these instructions, but did make a payment of a past due indebtedness, and that at that time the firm of Mitchell & Company was insolvent, and that said defendant bank had reasonable cause to believe that by accepting a payment it would secure an unlawful preference, and by so doing would secure a larger percentage of its debts than other creditors of the same class, then I instruct you such a payment, if you find it to be a payment, would be an unlawful preference, and your verdict should be for the plaintiff.

14

A deposit of money in a bank, upon an open account subject to check, is not a transfer constituting a pref-

erence, although the bank, as a creditor, has a right to set off its claims against the deposit, and the action of a bank in applying a deposit or any portion thereof upon a depositor's indebtedness to the bank does not constitute a preferential transfer, if received in good faith by the bank in due course of business; and if you find from the evidence in this case that the bankrupt sold certain gold dust to the American Bank of Alaska, in good faith and in the due course of business, with the intention that said money be placed to the bankrupt's general account in said bank, and that such deposit was so made, then I instruct you that the bank had the absolute right to set off against said deposit any overdraft due from the bankrupt and any notes then due from the bankrupt to said bank.

15

A balance left in a deposit subject to check by the depositor may be applied by the bank to the payment of the depositor's indebtedness to it, without violating the provisions of the National Bankruptcy Act against preferential transfers, although the transaction was within four months of the bankruptcy proceedings against the depositor, and the bank at the time had reasonable cause to believe him insolvent. And I instruct you that, even had the defendant bank in this case known that T. Mitchell & Company were insolvent at the time they made a deposit on July 31st, 1913, if you find such a deposit was made, such knowledge of such insolvency did

not deprive the defendant bank of its right to set off against said deposit any indebtedness due from said T. Mitchell & Company to said bank.

16

An overdraft arises when a customer of a bank draws from that bank more money than is standing to his credit in his account with the bank. It operates as a loan on the part of the bank to the customer, and the amount thus overdrawn is usually in numerals in the customer's pass book on the right hand page in red ink, from which custom has arisen the expression "in the red." When this condition arises, the customer is indebted to the bank. A subsequent deposit or deposits, if in the aggregate equal to or greater than the amount thus designated to be due the bank, extinguishes the debt without any act on the part of the customer other than making such deposit or deposits. A deposit thus made is a deposit subject to check in its technical sense. By this it is not meant that the sum or sums so deposited may at once be withdrawn the same as if the customer were not indebted to the bank. They are subject to check in the sense that by the very nature of the relation thus created between the bank and the customer, the sum total of all deposits made by the customer while dealing with the bank are subject to his check.

Herewith I hand you the pleadings and exhibits in the case, together with the instructions I have just read to you for your guidance.

Forms of general verdict are also submitted to be used by you if you so desire in making up a general verdict.

A form of special verdict is also submitted in which five interrogatories are propounded and which are to be answered by you "Yes" or "No."

When you shall have agreed upon a general verdict, you will return the same into court, together with your findings or answers to the interrogatories submitted in the special verdict.

Given at Fairbanks, Alaska, November 3rd, A. D., 1915.

CHARLES E. BUNNELL,

District Judge.

That defendant requested the Court, in addition to the instructions already given, to instruct the jury as follows:

(a) A deposit consists of the delivery by any person to a bank of money, or its equivalent, for the purpose of having the same retained by said bank, with the duty on the part of the bank to credit the person so leaving the money, or its equivalent, with said bank. Deposits may be general or special. In case of a general deposit, the moment the money is delivered to the bank it becomes the property of the bank and the relation of debtor and creditor then exists between the bank and the depositor, and the bank is thereupon liable to such person so depositing said money for the value thereof, and the person so depositing the same may withdraw the same in a var-

iety of ways, among which is drawing checks against said deposit, which checks the bank is obliged to pay, unless, among other things, it has not sufficient funds to the credit of the drawer of the check to pay the whole check, or said bank has appropriated said money for payment of a debt from the depositor to the bank, or has a lien thereon for overdue indebtedness from the depositor to the bank, and the bank is not obligated in any way to pay orders against said deposit in whatsoever form they may be presented to the net credit balance standing on the books of the bank in favor of said depositor.

(b) You are instructed that, if you find from the evidence in this case that the proceeds of the gold dust sold to the bank on the afternoon of 31 July 1913 were credited to the deposit account of T. Mitchell & Company at the time of such sale, then the bank had an absolute right to set off the indebtedness of said T. Mitchell & Company to it against the amount thus deposited, and such set-off could be made immediately upon the ascertaining of the amount of the purchase-price of said gold dust and the crediting of the same to the deposit account of said T. Mitchell & Company, regardless of whether or not said T. Mitchell & Company were insolvent, or whether or not, at the time of said set-off, the bank had reasonable cause to believe that said T. Mitchell & Company were insolvent.

(c) The instructions given to you relative to pref-

erence and the right of a trustee in bankruptcy to recover a preference must be taken subject to the right of the bank to set off the deposits to the credit of an insolvent person or firm against the overdraft or notes of said bank due to said bank; and, in connection with the right of set-offs, I instruct you that, in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid.

(d) You are instructed that if at the time of the insolvency of any person, firm, or corporation, said bankrupt has a deposit in a bank and is indebted to the bank for notes or overdrafts, the bank has an absolute right to set off the notes and overdrafts held by it against said account, and if the bank did not do so, it is the duty, under the bankruptcy law, of the referee in bankruptcy to ascertain the state of said account and to strike said balance, and to set off said notes or overdrafts against said deposit account.

(e) Money which is turned over to an officer of a bank without any request that it be kept separate from the other funds of the bank, and which is entered upon the books as a general deposit, and a certificate of deposit issued for the amount, or an entry thereof made upon the general account of such depositor, if he has an account with said bank, is a general deposit, and is not in any sense a special deposit. A deposit has been further defined as the thing or the sums received from the depositor, and

a deposit in a bank is presumed to be a general deposit, in the absence of an agreement to the contrary. The purpose and terms of a deposit may be explicitly stated or the intention of the parties may be inferred from their declarations considered in connection with their conduct and all the circumstances.

f) I instruct you that any delivery of money by a person to a bank, to be placed to his credit, is subject to check within the meaning of said expression, unless received and accepted by said bank as a special deposit in some form, not to be drawn against by check, and the right to check against said account is not an absolute right, even though said money is deposited subject to check, unless, after the making of said deposit, there is a credit balance in favor of said depositor, after the payment of any overdrafts that said depositor may have had and the charging against said account of any matured or overdue notes held by such bank against said depositor, and his right to draw out a sum of money equal to the amount deposited is limited by the right of the bank to set off its indebtedness against said amount so deposited, as you have been heretofore instructed.

(g) You are instructed that, where a bank holds a depositor's note, it has a right, at any time during the day on which said note falls due, or thereafter, to apply funds in its hands belonging to the maker of such note to the payment thereof, even where nothing will be left to the maker's credit to apply on checks.

(h) I instruct you that the enforcement by a bank of its lien or right of set-off by applying deposits, honestly made in the due course of business and without intent on the part of the depositor to prefer the bank, to the payment of the depositor's overdrafts and his notes in the bank's favor, as they mature, does not, although within four months of the bankruptcy proceedings against such depositor, constitute a preference forbidden by the National Bankruptcy Act, there being nothing in section sixty-eight of said act which prevents the parties from voluntarily doing before the petition is filed what the section itself requires to be done after the proceedings in bankruptcy are instituted.

(i) I instruct you that, if you are satisfied from the evidence in this case that the defendant bank made certain loans and permitted certain overdrafts to the firm of T. Mitchell & Company between their second and third clean-ups, upon the promise and agreement on the part of the said T. Mitchell & Company that they would deliver to said defendant bank the gold dust derived from the next clean-up, to secure or pay said loans and advances, then I instruct you that the transaction should be considered as the taking of security by said bank for a present loan or consideration, and the payment of said loan and advances by the delivery of said gold dust in accordance with the agreement, if you find such agreement was had, is not such a payment as would

constitute a preference in the contemplation of the National Bankruptcy Act.

That the Court then refused to give said instructions to the jury, to which refusal defendant then and there excepted, and said exception was allowed.

Exc. 43.

That, prior to the retirement of said jury and in the presence of said jury and after they had been instructed by the Court, the defendant made the following objections to the instructions already given by said Court, to wit:

(a) Excepts to Instruction No. 10 given by the Court, for the reason that no question of solvency or insolvency is involved in the case at bar, and is not, and could not be, involved in any issue arising out of the provisions of section sixty-eight of the National Bankruptcy Act, relative to set-offs, and the right of set-off, under the National Bankruptcy Act, does not depend, in any degree or at all, upon any knowledge or belief of the party making such set-off,—in this case the defendant bank,—as to whether or not the other party to the set-off is or is not insolvent, or whether or not the set-off would effect a preference in favor of the party making such set-off.

(b) Excepts to Instruction No. 13 given by the Court, for the reason that said instruction is an erroneous statement of the law, in that it limits the right of a bank to set off indebtedness of one of its

customers against a deposit account "subject to check."

Which said objections and exceptions on the part of defendant were by the Court overruled, and defendant then and there excepted thereto and said exception was allowed.

Exc. 44.

That defendant likewise, at said time and place, excepted to the Court's eliminating from defendant's proposed instructions certain parts thereof, to wit:

(c) Excepts to the Court's eliminating from defendant's proposed instruction, partially given in this cause as Instruction No. 8, the last portion thereof after the word "transaction", as given, which reads as follows: "And also the nature of the transactions concerning the sale of the two clean-ups theretofore sold to the bank by said T. Mitchell & Co., and the treatment by all parties of the proceeds of such sale, whether as deposits or otherwise, in the general account of said T. Mitchell & Co."

(d) Excepts to the Court's refusal to give, and elimination from, defendant's proposed instruction, partially given in this cause as Instruction No. 11, after the words "debtor's insolvency", the following clause, to wit: "And if you find from the evidence that the defendant in this case may have had some suspicion in regard to the insolvency of the firm of T. Mitchell & Co., that, in itself, is not sufficient."

Which said exception was then and there duly allowed.

Exc. 45.

That, before the retirement of said jury to consider their verdict and within the time prescribed by law, the defendant requested the Court to propound certain special interrogatories to said jury, consisting in five interrogatories, and the Court, in compliance with the request of defendant, submitted said interrogatories to said jury, to be answered at the same time their verdict was rendered.

That thereafter said jury retired to consider their verdict and said special verdict, and on the 3d day of November 1915 duly returned into said Court their general verdict, which was in the words and figures following, to wit:

[Title of Court and Cause.]

Verdict.

We, the jury, duly empaneled and sworn, do, from the law and the evidence, find the issues joined herein in favor of the plaintiff George Johnson, Trustee, and assess the amount of his recovery against the defendant The American Bank of Alaska at the sum of \$3750.27.

Dated: Fairbanks, Alaska, November 3rd, 1915.
J. M. Harris, Foreman.

(Endorsed: "Entered in Court Journal No. 12, page. 326. Filed in the District Court Territory of Alaska 4th Div. Nov 3 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

And at said time said Jury likewise returned into

Court their special verdict, which was as follows:
(Title of Court and Cause.)

Special Verdict.

We, the Jury duly impaneled and sworn to try the issues in the above entitled cause, do, in accordance with the evidence and the instructions of the Court, make the following findings to the special interrogatories submitted to us, as follows, to wit:

(1) Question: Did the American Bank of Alaska, on the thirty-first day of July, A. D. 1913, buy from Mitchell & Co., gold dust of the value of three thousand seven hundred thirty-four dollars and twelve cents (\$3,734.12)?

Answer: Yes.

(2) Question: Were the proceeds of said purchase deposited to the general bank account of Mitchell & Co., at the time of said purchase?

Answer:

(3) Question: Did the defendant bank, at the time it credited the value of said gold dust to the deposit account of Mitchell & Co., set off the amount of the overdraft due from Mitchell & Co., and their then past-due notes against said deposit account?

Answer:

(4) Question: Did the defendant bank, at the time it set off the overdraft and over-due notes against the deposit account of Mitchell & Co., have reasonable cause to believe that the firm of Mitchell & Co. was insolvent?

Answer: Yes.

(5) Question: Did the defendant bank, at the time it set off the over-draft and over-due notes of Mitchell & Co. against their deposit account, have reasonable cause to believe that, by so doing, a preference would be thereby effected?

Answer: Yes.

J. M. HARRIS.

P. J. WENN.

DANIEL M'CABE.

H. BUZBY.

JOHN PERLEND.

A. H. KELLER.

J. A. LILLIE.

E. N. BLAKELY.

J. BELLERBY.

D. HARTWIG.

C. N. CREAMER.

A. C. WOLFF.

Jurymen.

Dated: Fairbanks, Alaska, November 3rd. A. D. 1915.

(Endorsed: "Entered in Court Journal No. 13, page 326. Filed in the District Court Territory of Alaska 4th Div. Nov 3 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

That said jury failed and neglected to answer the questions Nos. 2 and 3, and were discharged without being required to answer said questions. That, after the jury had been deliberating for some time, they returned into Court and asked for further instruc-

tions as to the manner of answering the special interrogatories submitted to them by the Court, and particularly requested the Court to instruct them whether, if they were unable to, unanimously, agree on an answer to a particular interrogatory, they might answer such of the interrogatories as they could all agree on and not answer others at all, if there was a difference of opinion. The Court then, in the presence of the jury, called the attorneys for both parties to his desk, and said that it was his understanding of the practise that the jury was at liberty to answer such of the questions as they could all agree on and omit to answer others about which they were unable to agree, to which the attorneys on both sides acquiesced and consented, and on the suggestion of the Court that he would direct the jury that that effect orally, the said attorneys consented to such oral instruction, and thereupon the Judge of said Court instructed said jury orally in open Court, and in the presence of the attorneys for both parties, as follows:

The Court: "Gentlemen of the jury, it sometimes happens to the jury, as with a witness upon the stand, when special findings of fact are submitted in the form of a special verdict—interrogatories to be answered, that the jury, as a witness upon the stand, are unable to answer the question by yes or no. The theory in submitting findings or interrogatories to be answered, as these were, is that they could be answered by yes or no, but it may be possible that the ques-

tions can not be answered by yes or no. In that case, it is proper for you to make such answer as you believe is a proper and correct answer to the interrogatories submitted. However, if you find that there are any questions the answers to which you can not unanimously agree upon, you need not answer such questions. After you have unanimously answered as many answerable questions as possible, you should all sign said special verdict, which said special verdict is in addition to the general verdict, and return it into Court."

Foreman of jury Harris: "Do I understand you to say that, if we agree upon part of the questions, and we can not answer the rest of them, that we turn them into Court without an answer?"

The Court: "Yes sir; or, if you can not answer an interrogatory which is submitted to you by yes or no—if yes or no would not be a proper answer as you should unanimously consider the question, then you may make such answer to it as you unanimously agree and consider is a proper answer to make to the interrogatory submitted."

The jury then retired, and shortly afterwards came back into open Court, and through their foreman returned the verdict and answers to interrogatories as set out above, but at that time the attorneys for defendant made no objection to the form of the special findings, or the fact that two of them were left unanswered, and made no objection and saved no exception to the reception of said verdict and spe-

cial findings. Afterward, however, in the subsequent motions filed by the defendant complaint was made that two of said special findings had not been answered.

That, thereafter and within the time allowed by law, defendant filed a motion for judgment notwithstanding verdict, which was as follows, to wit:

[Title of Court and Cause.]

Motion for Judgment notwithstanding Verdict.

Comes now the defendant in the above entitled action and moves this Court for the entry of a judgment in favor of the defendant in the above entitled action and against the plaintiff in the above entitled action, notwithstanding the general verdict rendered on the third day of November, A. D. one thousand nine hundred fifteen, by the jury empaneled to try the issues in the above entitled cause.

This motion is made upon the following grounds, to wit:

(1) That the general verdict in this cause is contradictory to the answers of the jury to the questions propounded to them in the special verdict submitted for their consideration, which said special verdict and the answers of the jury contained therein show conclusively that the plaintiff is not entitled to the relief granted to him by the general verdict of said jury.

(2) That the special verdict of said jury and the answers to the questions therein propounded to said

jury show conclusively that, at the time the set-off alleged in the complaint and affirmative answer was made by the defendant bank, the relation of debtor and creditor existed between the firm of T. Mitchell & Co., bankrupts, and the defendant bank, at the time the set-off was made which is mentioned in the pleadings herein and in the special verdict of the jury herein.

(3) That the complaint herein does not state a cause of action in favor of the plaintiff as trustee in bankruptcy of the firm of T. Mitchell & Co. against the defendant.

(4) That said general verdict of the jury in this cause is not based upon a complaint which states any cause of action in favor of G. Johnson as trustee in bankruptcy of the firm of T. Mitchell & Co., against the defendant.

(5) That the jury in this cause did not unanimously agree upon a verdict in favor of the plaintiff upon the issues raised by the pleadings in this cause, and the special verdict rendered by said jury upon the questions propounded to them shows conclusively that the jury disagreed upon two or more of the essential and material issues in the case which were submitted to them, and that, without an unanimous agreement on said two essential and material issues, no valid general verdict could be rendered in favor of the plaintiff in this action.

(6) That it conclusively appears from the special verdict rendered by said jury, in answer to certain

questions propounded to them by the Court at the request of the defendant, that said jury found in favor of the defendant upon the special issues raised by defendant's affirmative answer.

JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant.

(Endorsed: "Due service hereof admitted this Nov. 6-1915 Louis K. Pratt, T. A. Marquam, Attorneys for Pltff.—Filed in the District Court Territory of Alaska 4th Div. Nov 6 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

That thereafter said Court overruled said motion, to which order defendant then and there excepted and said exception was allowed.

Exc. 46.

That, subsequent to the rendition of said verdict and special verdict and within the time prescribed by law, defendant filed a motion for a new trial, which was in the words and figures following, to wit:

[Title of Court and Cause.]

Motion for New Trial.

Now comes the defendant above named, and without waiving its motion heretofore filed for a judgment in favor of the defendant notwithstanding the verdict of the jury in favor of the plaintiff, and still insisting upon said motion, but in the event said motion is overruled, does now move this Court for an order setting aside the general verdict of said jury,

rendered and given on the third day of November, A. D. one thousand nine hundred fifteen, and giving and granting to this defendant a new trial of said action, upon the grounds following, to wit:

(1) Excessive damages, given under the influence of passion and prejudice, in this that, under no consideration, in view of the law relative to bankruptcy, could the jury have given a verdict for any sum in excess of the amount of the overdue notes held by said defendant bank and by it charged against the account of said T. Mitchell & Co., on the thirty-first day of July, A. D. one thousand nine hundred thirteen, as the receipt by said bank of the proceeds of the sale of the gold dust, would, immediately upon the receipt thereof, become the property of the bank, and would settle pro tanto any overdue indebtedness that then stood against the firm of T. Mitchell & Co. in favor of said bank, and it would only be the balance remaining to the credit of said T. Mitchell & Co. that could, in any sense, be treated as a preferential payment on said indebtedness.

(2) Insufficiency of the evidence to justify the verdict, and that said verdict is against law, in this that the preponderance of the evidence and the special verdict of the jury show conclusively that, on the thirty-first day of July, A. D. one thousand nine hundred thirteen, the firm of T. Mitchell & Co. made a general deposit with the defendant bank of the purchase price of the gold dust mentioned in the complaint, the amount of which deposit was afterwards

set off by said bank against the indebtedness due from said firm of T. Mitchell & Co. to said bank, and said evidence conclusively shows that said money, the proceeds of the sale of said gold dust, was not paid or delivered to the defendant bank as a payment upon any indebtedness due from the firm of T. Mitchell & Co. to said bank, but was delivered to said defendant bank in good faith on the part of T. Mitchell & Co. and the American Bank of Alaska, in due course of business, and was deposited by said bank in the general deposit account of said T. Mitchell & Co., and that said defendant, the American Bank of Alaska, had the absolute right to set off the amount of said proceeds of the sale of said gold dust against any, and all overdue indebtedness from said T. Mitchell & Co. to said bank.

(3) Errors in law occurring on the trial of this cause and excepted to by the defendant at the time, as follows:

(a) The Court erred in admitting in evidence plaintiff's exhibits B, C, D, E, F, G, G', H, I, J, K, and L, and each of said exhibits.

(b) The Court erred in admitting the testimony of Tony Lionovich to the effect that, on the morning of the first day of August, A. D. one thousand nine hundred thirteen, he presented a check drawn by T. Mitchell & Co. upon the defendant's bank, at said bank, and demanded payment thereof, and that payment was refused.

(c) The Court erred in admitting the evidence of

Harry Pratt, in regard to a conversation had by him with the officers of the defendant bank, about nine o'clock on the evening of the thirty-first day of July, A. D. one thousand nine hundred thirteen, relative to what was secured or attached under the writ of attachment in the case of Rutherford et al. vs. T. Mitchell & Co.

(d) The Court erred in admitting the testimony of James J. Fallon, relative to any conversations had with the officers of the American Bank of Alaska, on the morning of the first or second day of August, A. D. one thousand nine hundred thirteen, with reference to the cashing of checks.

(e) The Court erred in admitting the testimony of James J. Fallon, relative to checks drawn by him to the workmen employed by T. Mitchell & Co., on the thirty-first day of July, A. D. one thousand nine hundred thirteen.

(f) The Court erred in admitting the evidence relative to the financial condition of the firm of T. Mitchell & Co., and of the individual members of said firm, as of the thirty-first day of July, A. D. one thousand nine hundred thirteen, and all evidence given by the witness Fallon in regard to the values of the property held and owned by said T. Mitchell & Co. as a firm, or by any of the individual members of said firm, at said time or at any other time.

(g) The Court erred in admitting, on the cross-examination of the witness A. Bruning, evidence relative to any inquiries or investigations made or

not made by the officers of the defendant bank concerning the solvency or insolvency of the firm of T. Mitchell & Co., or any of the individuals constituting said firm.

(h) The Court erred in denying the defendant's motion for a non-suit at the close of the plaintiff's case.

(i) The Court erred in denying defendant's motion that the jury be directed to find a verdict in favor of the defendant, which motion was made at the close of all the testimony in the case.

(j) The Court erred in refusing to strike out plaintiff's exhibit 'G', the same being the undertaking of plaintiff in this action as trustee of the purported estate of T. Mitchell & Co.

(k) The Court erred in giving instruction No. 10, for the reason that no question of solvency or insolvency is involved in the case at bar, and is not, and could not be, involved in any issues arising out of the provisions of section sixty-eight of the National Bankruptcy Act, relative to set-offs, and the right of set-off, under the National Bankruptcy Act, does not depend, in any degree or at all, upon any knowledge or belief of the party making such set-off,—in this case, the defendant bank,—as to whether or not the other party to the set-off is or is not insolvent, or whether or not the set-off would effect a preference in favor of the party making such set-off.

(1) The Court erred in giving instructions No. 13, for the reason that said instruction is an errone-

ous statement of the law, in that it limits the right of a bank to set off indebtedness of one of its customers against a deposit account "subject to check."

(m) The Court erred in refusing to give defendant's proposed instructions numbered, 2, 3, 11 12,¹³ 14, 15, 17, 25, by this Court, and each of said proposed instructions. Feb.

(n) The Court erred in eliminating from defendant's proposed instruction partially given in this cause as instruction No. 8, the words "and also the nature of the transactions concerning the sale of the two cleanups theretofore sold to the bank by said T. Mitchell & Co., and the treatment by all parties of the proceeds of such sale, whether as deposits or otherwise, in the general account of said T. Mitchell & Co."

(o) The Court erred in striking from defendant's proposed instruction partially given in this cause as instruction No. 11, the words "and if you find from the evidence that the defendant in this case may have had some suspicion in regard to the insolvency of the firm of T. Mitchell & Co., that, in itself, is not sufficient."

(p) The Court erred in accepting the general verdict of the jury, for the reason that the jury in this cause did not unanimously agree upon a verdict in favor of the plaintiff upon the issues raised by the pleadings in this cause, and the special verdict rendered by said jury upon the questions propounded to them shows conclusively that the jury disagreed

upon two or more of the essential and material issues in the case which were submitted to them, and that, without a unanimous agreement on said two essential and material issues no valid general verdict could be rendered in favor of the plaintiff in this action.

JOHN K. BROWN

McGOWAN & CLARK

Attorneys for Defendant.

(Endorsed: "Due service hereof admitted this Nov 6 1915 Louis K. Pratt, T. A. Marquam, Attorneys for plaintiff. Filed in the District Court Territory of Alaska 4th Div. Nov 6 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

That thereafter, after argument, the Court overruled said motion for a new trial, to which order defendant then and there excepted and said exception was duly allowed. (Exception No. 47).

Exc. 47.

That thereafter defendant filed an objection to the entry of any judgment in favor of plaintiff, which objection was as follows, towit:

[Title of Court and Cause.]

Objection to Entry of Judgment in favor of Plaintiff.

Comes now the defendant in the above entitled cause and objects to the Court entering any judgment in favor of the plaintiff in this cause upon the alleged general verdict returned on the third day of November, A. D. one thousand nine hundred fifteen, by the jury empaneled to try the issues in said cause.

for the reasons that:

'(1) The jury in this cause did not unanimously agree upon a verdict in favor of the plaintiff upon the issues raised by the pleadings in this cause, and the special verdict rendered by said jury upon the questions propounded to them shows conclusively that the jury disagreed upon two or more of the essential issues in the case which were submitted to them, and that, without a unanimous agreement on said two essential and material issues, no valid general verdict could be rendered in favor of the plaintiff in this action.

(2) That the plaintiff's complaint does not set forth a cause of action against the defendant.

JOHN K. BROWN
McGOWAN & CLARK,

Attorneys for Defendant.

(Endorsed: "Due service hereof admitted this Nov 6 1915 Louis K. Pratt, T. A. Marquam, Attorneys for Pltff. Filed in the District Court Territory of Alaska 4th Div. Nov 6 1915 J. E. Clark Clerk By Sidney Stewart Deputy.")

Which objection was overruled, and to the order overruling same defendant then and there excepted and said exception was allowed

Exc. 48.

That, subsequent to the rendition of the verdict and prior to the argument for a judgment notwithstanding the verdict, defendant moved the Court for an order permitting it to amend paragraph 1 of its

answer to plaintiff's amended complaint, to conform to the evidence in said cause, by changing the words therein "August 1st, 1913" to "July 31st, 1913"; to amend paragraph 4 of its affirmative answer, by changing the words "August 1st, 1913" to "July 31st, 1913"; and to amend paragraph 5 of its affirmative answer, by changing the words "August 1st. 1913" to "July 31st, 1913"; all on the ground that the evidence introduced showed that said "August 1st, 1913" was erroneously given in said complaint when it should have been "July 31st, 1913". The Court then and there denied said motion and refused said request to amend said complaint in the particulars above set forth; to which order and denial defendant then and there excepted and said exception was allowed.

Exc. 49.

And now, in furtherance of justice and that right may be done, the defendant in the above entitled cause, within the time allowed by law and the orders of this Court extending the defendant's time within which to prepare, serve, and file its bill of exceptions in this cause, herewith presents the foregoing bill of exceptions in the above entitled cause, and prays that the same may be settled, signed and allowed by the Judge of this Court, in the manner prescribed by law.

JOHN K. BROWN
McGOWAN & CLARK,
Attorneys for Defendant.

Due service of the within and foregoing bill of exceptions admitted this second day of February, A. D. one thousand nine hundred sixteen.

THOMAS A. MARQUAM,

and

LOUIS K. PRATT,

Attorneys for Plaintiff.

(Endorsed: "Filed in the District Court Territory of Alaska, 4th Div. Feb. 2, 1916. J. E. Clark Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Order Settling and Allowing Bill of Exceptions.

Be it remembered that, on the 21st day of February, A. D. one thousand nine hundred sixteen, the defendant, The American Bank of Alaska, a corporation, presented the foregoing bill of exceptions to the Court for settlement, which said proposed bill of exceptions was served and filed within the time allowed by law and the orders of this Court, and thereafter the plaintiff presented certain proposed amendments to said bill of exceptions so presented, and on the nineteenth day of February, A. D. one thousand nine hundred sixteen, said matter came up for hearing and said amendments, with certain modifications, were allowed, and said bill of exceptions has been amended to conform with the orders of this Court; and it appearing to the satisfaction of this Court, on examination of the said bill of exceptions as amended, that it contains a full, true, and correct

record of the proceedings in connection with said matters, and all the material evidence, including the exhibits introduced by the respective parties during the hearing of said cause; and the Court being fully advised in the premises:

Now, therefore, upon motion of the attorneys for the defendant, it is ordered that the foregoing bill of exceptions be, and the same is, hereby approved, allowed, and settled as the bill of exceptions in the above entitled cause, and made a part of the record herein, and that the same has been filed and presented within the time allowed by the orders of this Court, and that the clerk of this Court re-file said bill of exceptions as of this date.

Done, in open Court, at Fairbanks, Alaska, on this 21st day of February, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 411.

Endorsed: "Filed in the District Court Territory of Alaska 4th Div. Feb 21, 1916 J. E. Clark, Clerk, by L. F. Protzman, Deputy.")

[Title of Court and Cause.]

Judgment.

Now at this time, to-wit, October 30, 1915, the same being one of the days of the regular March 1915 term of this Court, this cause came on to be

heard before the Court and a jury, on the amended complaint, the answer and supplemental answer and the reply thereto, as on file. The plaintiff, G. Johnson, appeared in person and by Thomas A. Marquam and Louis K. Pratt, his attorneys, and the defendant appeared by Messrs. McGowan & Clark and John K. Brown, its attorneys. Evidence, both oral and documentary, was introduced on behalf of the plaintiff, and also the defendant, and after rebutting evidence both sides rested on the evening of November 3, 1915, said trial having been in progress from and during the 30th day of October to and including the 3rd day of November, 1915. The respective attorneys then argued the case to the jury, after which the jury was instructed in writing by the Court and afterwards retired in charge of sworn bailiffs to deliberate upon their verdict, and later in the day and on the evening of November 3, 1915, returned into open court and delivered their general verdict, as well as answers to special findings of fact which had been submitted to them for answer by the Court in addition to said general verdict. The said general verdict and special questions and answers, omitting the caption and title, were in the words and figures following:—

“We the jury, duly empaneled and sworn, do, from the law and evidence, find the issues joined herein in favor of the plaintiff George Johnson, Trustee, and assess the amount of his recovery against the defendant The American Bank of Alaska at the

sum of \$3750.27.

Dated: Fairbanks, Alaska, November 3rd, 1915.

J. M. HARRIS,
Foreman."

"We, the jury, duly empaneled and sworn to try the issues in the above entitled cause, do, in accordance with the evidence and the instructions of this Court, make the following findings to the special interrogatories submitted to us, as follows, to-wit:

(1) Question: Did the American Bank of Alaska, on the thirty-first day of July, A. D. 1913, buy from Mitchell & Co., gold dust of the value of three thousand seven hundred thirty-four dollars and twelve cents (\$3,734.12)?

Answer: Yes.

(4) Question: Did the defendant bank, at the time it set off the overdraft and over-due notes against the deposit account of Mitchell & Co., have reasonable cause to believe that the firm of Mitchell & Co. was insolvent?

Answer: Yes.

(5) Question: Did the defendant bank, at the time it set off the overdraft and overdue notes of Mitchell & Co., against their deposit account, have reasonable cause to believe that, by so doing, a preference would be thereby effected?

Answer: Yes.

J. M. HARRIS.
P. J. WENN.
DANIEL McCABE.

H. BUZBY.
JOHN PERLEND.
A. H. KELLER.
J. A. LILLIE.
E. N. BLAKELY.
J. BELLERBY.
D. HARTWIG.
C. N. CREAMER.
A. C. WOLFF."

Dated: Fairbanks, Alaska, November 3rd, A.D. 1915.

And said general verdict and special findings being such as the Court would accept, the same were by the Court ordered filed with the papers in the cause. And upon motion of the plaintiff it was ordered, that judgment be entered in accordance therewith.

IT IS THEREFORE, CONSIDERED, ORDERED and ADJUDGED, by the Court, that the plaintiff, G. Johnson, Trustee, &c., do have and recover of and from the defendant, The American Bank of Alaska, a corporation, the sum of three thousand seven hundred and fifty dollars and twenty-seven cents (\$3750.-27) so found to be due him from the defendant by the said verdict, and for his costs and disbursements amounting to \$., the same to be taxed by the Clerk for the collection of which let execution issue.

This judgment shall draw interest at the rate of eight percentum (8 per cent.) per annum from this date.

Dated at Fairbanks, Alaska, this 18th day of March, 1916.

CHARLES E. BUNNELL,

District Judge.

Entered in Court journal No. 13 page 460.

Received copy of foregoing March 8th 1916 McGowan & Clark, John K. Brown, Attys for deft.

(Indorsed: "Filed in the District Court Territory of Alaska 4th Div. Mar. 18 1916 J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Supplemental Bill of Exceptions.

Be It Remembered: That, subsequent to the time when the above-entitled Court overruled defendant's motion for a new trial and for judgment notwithstanding the verdict and defendant's objection to the entry of any judgment on the verdict rendered by the jury in said cause, to wit, on the 18th day of March 1916, plaintiff served upon the attorneys for the defendant and presented to the Court for signature the judgment thereafter signed and filed in this cause; that, prior to the signing and filing thereof, defendant objected to the signing thereof by the Court, for the reason that the special interrogatories No. Two and No. Three, submitted to the jury by the Court in said action and not answered by them, being in the words and figures following, to wit:

"(2) Question.—Were the proceeds of said purchase deposited to the general bank account of Mitch-

ell & Co., at the time of said purchase?

Answer.—.....

(3) Question.—Did the defendant bank, at the time it credited the value of said gold dust to the deposit account of Mitchell & Co., set off the amount of the overdraft due from Mitchell & Co., and their then past-due notes against said deposit account?

Answer.—.....

had not been included in said judgment, and objected to the signing of said judgment unless said special interrogatories were included therein and made a part thereof as a part of the special verdict filed by the jury in said cause; that said Court then and there overruled the objections of said defendant, and refused to order said special interrogatories, above set forth and which were returned by said jury unanswered, to be inserted in said judgment and made a part thereof; to which ruling of said Court defendant then and there duly excepted, and said exception was allowed by the Court.

Exc. 50.

That thereafter the Judge of the above entitled Court signed said judgment, and to the signing thereof this defendant then and there excepted and said exception was duly allowed.

Exc. 51.

And now, in furtherance of justice and that right may be done, the defendant in the above-entitled cause, within the time allowed by law, herewith presents the foregoing bill of exceptions in the above en-

titled cause, and prays that the same may be settled, signed, and allowed by the Judge of this Court in the manner prescribed by law.

JOHN K. BROWN
McGOWAN & CLARK,
Attorneys for Defendant

Due service of the within and foregoing bill of exceptions admitted this 1st day of April, A. D. 1916.

THOS. A. MARQUAM
LOUIS K. PRATT

Attorneys for Plaintiff

Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. April 1, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Order Settling and Allowing Supplemental Bill of Exceptions.

Be it remembered that, on the 10th day of April, A. D. one thousand nine hundred sixteen, the defendant, The American Bank of Alaska, a corporation, presented the foregoing supplemental bill of exceptions to the Court for settlement, which said proposed bill of exceptions was served and filed within the time allowed by law and the orders of this Court, and the plaintiff not having proposed any amendments to said bill of exceptions so presented, and said matter coming on regularly for hearing upon defendant's application to have said bill of exceptions settled and allowed, plaintiff being represented by his

counsel, Louis K. Pratt, esq., and Thomas A. Marquam, esq., and the defendant by its counsel, John Knox Brown, esq., and Messrs McGowan & Clark, and it appearing to the satisfaction of this Court, upon examination of said bill of exceptions as amended, that it contains a full, true, and correct record of the proceedings relative to the signing of the judgment in this case and defendant's objections thereto, and that said proposed supplemental bill of exceptions is in all respects true and correct, and the Court being fully advised in the premises:

Now, therefore, upon motion of the attorneys for defendant, it is ordered that the foregoing supplemental bill of exceptions be, and the same is hereby, allowed, approved, and settled as a bill of exceptions in the above entitled cause, and made a part of the record herein, and that the same has been filed and presented within the time allowed by the orders of this Court, and that the clerk of this Court re-file said bill of exceptions with this order, as of this date.

Done in open Court at Fairbanks, Alaska, on this 10th day of April, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 13, page 501.

Indorsed: "Filed in the District Court Territory of Alaska 4th Div. Apr. 10, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Assignment of Error.

Comes now the defendant in the above entitled cause, being the plaintiff in error, and assigns the following error as having been committed by the above named Court on the trial of the above entitled cause, which error the said defendant intends to and does rely upon on defendant's writ of error to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California.

Pleadings and Procedure.

(1) The Court erred in overruling defendant's demurrer to plaintiff's amended complaint.

(2) The Court erred in refusing to direct the jury to bring in a verdict in favor of defendant upon defendant's motion at the close of plaintiff's case, and in denying defendant's motion for a directed verdict at said time. (Defendant's exception No. 32.)

(3) The Court erred in overruling defendant's motion for a non-suit at the close of defendant's case. (Defendant's exception No. 32.)

(4) The Court erred in overruling defendant's motion at the close of all the evidence to instruct the jury to bring in a verdict in favor of defendant, and in refusing defendant's motion at said time for a directed verdict. (Defendant's exception No. 42.)

(5) The Court erred in receiving the general and special verdicts of the jury when said jury failed to answer all the special interrogatories submitted to

them by the Court.

(6) The Court erred in discharging said jury before they had reached a unanimous verdict on each and all the special interrogatories submitted to them by the Court at defendant's instance.

(7) The Court erred in accepting the general verdict of said jury when the special verdict showed on its face that said jury disagreed on two at least of the essential elements necessary to be agreed upon before the said general verdict could be rendered, as shown by their failure to answer two of the special interrogatories submitted to them.

(8) The Court erred in overruling the defendant's motion to enter a judgment in favor of the defendant notwithstanding the verdict of the jury, and in refusing to enter the same. (Defendant's exception No. 46.)

(9) The Court erred in overruling defendant's motion for a new trial, and in refusing to grant a new trial. (Defendant's exception No. 47.)

(10) The Court erred in entering any judgment in favor of plaintiff on the general and special verdicts rendered by said jury, and in overruling defendant's objection to the entry of any judgment in favor of plaintiff on the verdict so rendered. (Defendant's exception No. 48.)

Admission of Evidence.

(11) The Court erred in admitting in evidence, over defendant's objection, plaintiff's exhibit "E",

purporting to be a notice of the appointment of G. F. Johnson as trustee in the matter of the estate of T. Mitchell & Co., bankrupts. (Defendant's exception No. 1.)

(12) The Court erred in admitting in evidence, over defendant's objection, plaintiff's exhibit "B", purporting to be an order for the appearance of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, in the matter of T. Mitchell & Company, a mining copartnership composed of Thomas Mitchell, James J. Fallon, and Herman Fawcett, bankrupts. (Defendant's exception No. 2.)

(13) The Court erred in admitting, over defendant's objection, plaintiff's exhibit "C", purporting to be the schedules in bankruptcy filed in the matter of T. Mitchell & Company, a mining copartnership composed of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, bankrupts. (Defendant's exception No. 3.)

(14) The Court erred in admitting in evidence, over defendant's objection, the alleged adjudication of bankruptcy, entitled "In the matter of T. Mitchell & Company, a mining copartnership composed of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, bankrupts," but the body thereof purporting to adjudicate the bankruptcy of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, as individuals, there being no petition on file to have said individuals adjudged bankrupts, and said order of adjudication failing to adjudge the firm of T. Mitchell & Company bankrupt. (Defendant's exception No. 4.)

(15) The Court erred in admitting in evidence, over defendant's objection, plaintiff's exhibit "F", which purports to be an order of reference and is entitled "In the matter of the estate of T. Mitchell & Co., a mining copartnership composed of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, bankrupts," and which recites in the body thereof that Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, had been adjudged bankrupts, and does not recite that the copartnership of T. Mitchell & Co. had been so adjudged. (Defendant's exception No. 5.)

(16) The Court erred in admitting in evidence over defendant's objection plaintiff's exhibit "G" and "G-1", being under one cover, purporting to be a notice of the appointment of a trustee, notice of acceptance of trustee, and undertaking of trustee, upon which is indorsed the approval of said undertaking by the referee in bankruptcy, all entitled "In the matter of Thomas Mitchell & Co., bankrupts", when there was no evidence before the Court showing that said Mitchell & Co. had ever been adjudged bankrupts, and all the evidence showed that, if there had been any adjudication in bankruptcy, it was the bankruptcy of the three individuals and not of the copartnership. (Defendant's exception No. 6.)

(17) The Court erred in overruling defendant's motion to strike from the record and the evidence plaintiff's exhibit "G-1", which was the undertaking included in the general exhibit "G" under one cover,

said undertaking being in form an undertaking for the administration of the estate of Mitchell, Fallon, and Fawcett, and not for the administration of the estate of T. Mitchell & Co. (Defendant's exception No. 7.)

(18) The Court erred in permitting the witness James J. Fallon, over defendant's objection, to testify as follows:

"Q. What were the assests of the partnership at the time of your commencing operations?

!(Defendant objects as immaterial, not within the issues in the case. Objection overruled. Exception.)

A. My partners, Mr Fawcett and Mr Mitchell, didn't have much. They had their experience to put in and their labor to put up. I was working at the time and I furnished, to about the latter part of April, the money to keep the lease going financially. That is from the 18th of January until about the middle of April. That was during the period when we were opening up. Then we had to pump water there and it cost quite a bit of money, and thereafter I had to get assistance, which the bank loaned me. During that time all the financial assistance that the company had came from me; the other members had nothing but their experience as miners. They were willing to do right as a partnership should....." etc.

Which said evidence covered a period before any money had been loaned to the partnership by the bank and many months before the transaction oc-

curred which is the basis of the complaint in this action, and at a time when it was not claimed that said copartnership was insolvent. (Defendant's exception No. 8.)

(19) The Court erred in permitting the witness James J. Fallon, over defendant's objection, to testify as follows:

Q. What was the property that you had at that time?

Defendant objects as immaterial. Objection overruled. Exception.)

A. I had a side claim, No. Seven above, on Fairbanks Creek, right limit, the Fallon Bench. I had another piece, the Owl Association, a half interest in her, and Four above, on the right limit of Little Eldorado. That was my personal assets. I retained that many until the time of these bankruptcy proceedings." (Defendant's exception No. 9.)

Q. What became of it then?

(Defendant objects as immaterial. Objection overruled. Exception.)

A. That was put in the schedule. Defendant's exception No. 10.)

as both said questions were directed to the personal assets of one member of the copartnership when the copartnership was formed, many months before the occurrence of the transaction complained of in the complaint, and the basis of the action is not the bankruptcy of the individual members of the firm but of the copartnership itself.

(20) The Court erred in permitting the defendant Fallon, over defendant's objection, to testify as follows: (referring to the property heretofore testified to, that he owned at the time the copartnership was formed)

"Q. What was the value of that property on the 31st day of July 1913, that you have just described?

(Defendant objects as witness has testified to personal property belonging to himself as an individual and not to the copartnership. The question of the solvency or insolvency of the individual members of the copartnership is not before the Court at the present time, there being no contention that the individuals have ever been adjudged bankrupt. Objection overruled. Exception.

A. Well, I guess it is worth the same as it was down on the assets; a thousand for Fairbanks Creek, and five hundred for Little Eldorado.

as the question of the value of the assets of the individuals, under plaintiff's theory of the case, was not involved in said action, since the basis of his action was that the copartnership of T. Mitchell & Co. was the bankrupt, and there is no evidence to show that the individuals had ever transferred their own personal holdings to said copartnership. (Defendant's exception No. 11.)

(21) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as follows:

“Q. When did you commence actual mining operations in the way of extracting gold in large quantities from the ground out of this lease or lay?

A. About the ninth of June.

Q. Prior to that time what debts had you incurred, Mr Fallon?

(Defendant objects as immaterial. Overruled. Exception.)

A. Well, probably—(interrupted)

Mr Clark: We object that it is not the best evidence if he has the books.

(No ruling on the objection.)

A. About fifteen hundred dollars.

The Court: What date was that?

Mr Marquam: At the time they commenced the excavation of dirt and removal of it to the surface.

Q. What date was that?

A. That was the ninth of June. That was the money that the copartnership owed me. The money that I had advanced for them. The company owed the American Bank at that time about four hundred dollars.”

as said inquiry was directed to a period long prior to the time when it is claimed that T. Mitchell & Co. had been adjudged bankrupts and many months prior to the time of the occurrence of the transaction complained of in plaintiff's complaint. (Defendant's exception No. 12.)

(22) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as fol-

lows:

"Q. Do you know how your account stood at the American Bank when you brought your first cleanup in?

A. We owed them about fourteen hundred dollars.

Q. Was their account taken out of the proceeds of the gold dust that you brought in at that time?

A. No; the checks were all honored.

Q. The checks for what?

A. For wages, and for merchandise too; any checks that were wrote out by me for the firm were honored.

Q. So your account at the bank, after the first cleanup, had been disposed of, stood just the same as it had before?

(Defendant objects as leading and suggestive. Overruled. Exception.)

A. I beg pardon.

Q. I understood the effect of your testimony to be that, after the disposition of the first cleanup or the proceeds thereof, your account at the bank stood the same as before the cleanup was brought in?

A. Yes, exactly."

as said transaction there referred to occurred many weeks before there was any claim that the firm was insolvent, and practically two months before the occurrence of the transaction complained of, and the question was leading, suggestive, and not the best evidence. (Defendant's exception No. 13.)

(23) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as follows:

"Q. I will ask you, at that time, after the 31st day of July 1913, were you still an employer of labor? Did you contract any labor debts after that date?

A. None whatever. As shown by our schedule, we owed other accounts,—merchandise, etc., amounting to \$7532.75, exclusive of labor bills.

Q. Now, with regard to your assets at that time, the assets of the firm of T. Mitchell & Co., your schedule shows: personal property—(interrupted)

(Defendant objects as immaterial; that, if they are going to stand on the adjudication, they are bound by the adjudication. Plaintiff's attorney, Mr. Marquam, states that the adjudication that was made was that the firm was insolvent on the 25th of August 1913, and attention is now directed to a time 20 days earlier, at the time of the transaction with the bank. Objection overruled. Exception.)

A. We had, as shown by the schedules, property in the way of mining outfit amounting to \$1786.00; that is the machinery and so forth on the claim on the 31st of July 1913 the assest and liabilities, as shown by the schedule, was the condition of the firm on the 31st day of July 1913. The firm had no other assets at that time."

as the evidence in the case had shown that the firm of T. Mitchell & Co. had never been adjudicated a bank-

rupt and the assets of the firm at that time, so far as this proceeding was concerned, was immaterial. (Defendant's exception No. 14.)

(24) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as follows:

"Q. What was the condition of the assets or the property of the individual members of that copartnership? Had they increased any? Had yours increased any from the time you described a while ago when you commenced mining operations and told what property you had?

(Defendant objects as irrelevant, incompetent, and immaterial. Overruled. Exception.)

A. I didn't make anything.

Q. Had the condition of the other members, so far as property was concerned, changed any during that time?

A. No."

As, according to plaintiff's theory, the copartnership had been adjudged a bankrupt and not the individuals, and the condition of the individuals' property, so far as the present proceedings are concerned, would be absolutely immaterial. (Defendant's exception No. 15.)

(25) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as follows:

"Q. To whom had you issued checks before this last cleanup?

(Defendant objects, as witness stated that he did not know he had any checks standing out. Overruled. Exception.)

A. What is it?

Q. To whom had you issued checks prior to this third cleanup and the time that you brought that in to the bank?

A. Well, labor and merchandise.

Q. Can you give us an idea of about how many checks, or the amount of the checks, you had issued between your second cleanup and your third cleanup?

Defendant objects as immaterial. Overruled. Exception.)

A. There was \$3071.00 labor checks and \$1800.00 —(interrupted)

Q. Were those outstanding at the time you brought this last cleanup in to the bank?

A. No sir, they were paid between the sixteenth and the thirty-first.

Q. Do you know how many were not paid; that were still outstanding?

A. No, I couldn't tell you that.

Q. Do you know whether there was a considerable amount or otherwise?

(Defendant objects as immaterial. Overruled. Exception.)

A. There must have been. From the 16th all the checks that were issued up to the second cleanup were honored; but after the second cleanup there was \$6000.00—well, yes, there was about \$4000.00

worth of checks that were not honored.

Q. That were not paid?

A. Yes.

Q. That could not be. If you can give us an idea from your data as to how many checks were outstanding that were not paid by the bank, why, give it to us.

'(Defendant objects as immaterial. Overruled. Exception.)

Q. I think you misunderstand the question. I want to know how many checks that you had issued in behalf of Mitchell & Co. were outstanding, that hadn't been paid by the bank on the 31st day of July 1913; can you give us some idea as to that?

A. About \$2594.00"

as the question as to the amount of checks outstanding was absolutely immaterial, especially in view of the fact that this knowledge was not brought home to the defendant until after the set-off made by the defendant bank, the basis of this action. (Defendant's exceptions Nos. 17, 18, 19, 20.)

(26) The Court erred in permitting the witness Fallon, over defendant's objection, to testify as follows:

"Q. What, if anything, did you say to Mr Bruning, when you came in with this last cleanup, either that night or the next day, about things looking better out there?

(Defendant objects as not redirect-examination. Overruled. Exception.)

A. I told Mr Bruning, when he passed me the vouchers, the first thing I told him, I said: Mr Bruning, I am sorry that you have come to that conclusion, that you can not carry us any longer and honor these checks that I have made out for the men, as the ground is looking a little better, and I have no doubt that we will probably be able to get through, be able to square up everything. I told him that."

as the matters therein testified to were not proper on redirect examination and related to statements made subsequent to the time the bank had made the set-off complained of. (Defendant's exception No. 23.)

(27) The Court erred in permitting the witness Fallon, over defendant's objection, on redirect examination, to testify as follows:

"Q. Mr Bruning, as the result of that conversation (the conversation last referred to) knew that there were outstanding checks against his bank drawn by yourself for all the money that was owed by you to your workmen?

(Defendant objects as immaterial. Overruled. Exception.)

A. Exactly."

as this related to a conversation had subsequent to the time of the set-off complained of. (Defendant's exception No. 24.)

(28) The Court erred in permitting the introduction in evidence of the civil docket of the United States Commissioner's Court for Fairbanks Precinct, at a time when John K. Brown was on the stand as

a witness and over defendant's objection, after said witness had testified that, on the 31st day of July 1913, a case was filed in the Commissioner's Court entitled Rutherford & Widman vs. T. Mitchell & Co., as shown by the following:

Mr Marquam: We offer in evidence the docket entries with reference to the case of Rutherford & Widman against T. Mitchell & Co.

Mr Clark: We object, beyond the mere recital that the complaint was filed and the writ of attachment was issued; we think, beyond that, that it is not the best evidence in regard to any service, or anything of that kind.

(Defendant objects. Overruled. Exception.)

Mr Clark: That is, we object to all except that particular part.

The Court: Yes, it may be admitted and marked plaintiff's exhibit "H".

as the entries in the judgment docket are not the best evidence of the fact that was sought to be proven in said transaction, to wit, the levy of the notice of garnishment on the defendant herein. (Defendant's exception No. 25.)

(29) The Court erred in admitting in evidence, over defendant's objection, plaintiffs exhibits "I" and "J", which paper purport to be the return on a writ of attachment made by a deputy United States marshal, and an answer to a notice of garnishment, in a case entitled Rutherford & Widman vs. T. Mitchell & Co., introduced in evidence while deputy marshal

M. O. Carlson was on the stand as a witness, said papers never having been filed in the United States Commissioner's Court in which said action was pending and not being identified by the person who levied the same, and the only foundation for their introduction being the testimony of the witness that the return on the writ of attachment was in the handwriting of W. W. Fife, who was at one time a deputy marshal in the Fourth Judicial Division of the Territory of Alaska. (Defendant's exception No. 26.)

(30) The Court erred in admitting in evidence, over defendant's objection, while the witness John K. Brown, United States Commissioner and ex-officio Justice of the Peace, was on the stand, the complaint filed in a case in his Court, entitled Rutherford & Widman vs. T. Mitchell & Co., said complaint being marked plaintiff's exhibit "K". (Defendant's exception No. 27.)

(31) The Court erred in admitting in evidence, over defendant's objection, plaintiff's exhibit "L", which purported to be a writ of attachment, issued out of the United States Commissioner's Court at Fairbanks, Alaska, in a case entitled Rutherford & Widman vs. T. Mitchell & Co. (Defendant's exception No. 28.)

(32) The Court erred in permitting the witness Fawcett, over defendant's objection, to testify as follows: (referring to a time after the gold dust in question had been deposited with the American Bank of Alaska on 31 July 1913):

"Q. State to the jury what you went back to the bank for on this second occasion, about fifteen minutes after you had delivered the gold dust.

A. I heard that there was to be an attachment served against the gold dust, and I went in to find out whether anything could be done.

Q. Who did you understand was levying the attachment?

A. Jack Nelson.

'(Defendant objects as hearsay. Overruled. Exception.)

(Defendant's exception No. 29.)

(33) The Court erred in permitting the witness Tony Liongavich, over defendant's objection, to testify as follows:

"My name is Tony Liongavich; I am a miner and worked during the summer on the Hoffman Bench for Mitchell & Co. I came to town about the 1st of August, at the same time these gentlemen brought in the last cleanup. I came on the same train, on the 31st of July.

Q. What was your purpose in coming to town?

(Objection as immaterial. Overruled. Exception.)

A. I came in to town to cash in my check."

there being no evidence that the American Bank of Alaska had any knowledge that said witness had a check, or that the check was presented to be cashed, at any time before the proceeds of the gold dust sold to the bank had been applied toward wiping out the indebtedness of T. Mitchell & Co. (Defendant's ex-

ception No. 30.)

(34) The Court erred in permitting the witness Fallon, testifying for plaintiff on redirect examination, over defendant's objection, to testify as follows:

"Q. Mr Fallon, during the month of July, while you were carrying on operations out there, what was the average number of men employed?

(Defendant objects as immaterial. Overruled. Exception.)

A. About fifty men—fifty to fifty-five."

There being no evidence to indicate that the defendant had knowledge of the number of men, or that said men had not been paid, and the number of the men employed being absolutely immaterial so far as the issues in this case are concerned. (Defendant's exception No. 31.)

(35) The Court erred in requiring the witness Bruning, over defendant's objection, on cross-examination, to answer the following questions:

"Q. When he came to the bank about banking operations with you, did you inquire of him as to what property he had?

(Defendant objects. Overruled. Exception.)

A. Mr Hurley was here at the time the original loan was made to Mr Fallon; it was not me.

Q. That don't answer my question. You said a while ago that Mr Fallon was the man that came there and made arrangements about doing banking business, didn't you?

A. Yes sir, the record will show that Mr Fallon

was there. Yes.

Q. Did you inquire of him?

A. I did not; Mr Hurley may have."

as said inquiry was not proper cross-examination and was directed to a time long prior to the time when it is alleged that the firm of T. Mitchell & Co. was insolvent. (Defendant's exception No. 33.)

(36) The Court erred in requiring defendant's witness Bruning, on cross-examination, to testify, over defendant's objection, as follows:

"Q. How much were they behind (referring to Mitchell & Co.) at the end of the second cleanup?

(Defendant objects as immaterial and not proper cross-examination. Overruled. Exception.)

A. At the end of the day, on the 16th, they were \$133.71 overdrawn."

as said matter was not brought out on direct examination and referred to a time long prior to the occurrence of the transaction in controversy, at a time when no claim was made that T. Mitchell & Co. were insolvent. (Defendant's exception No. 34.)

(37) The Court erred in compelling defendant's witness Bruning, on cross-examination, over defendant's objection, to testify as follows:

"Q. Run ahead a few days, to the eighteenth; what was the condition of the account on that day?

(Defendant objects as immaterial. Overruled Exception.)

A. At the end of the day on the eighteenth it shows an overdraft here of \$527.69."

as the time therein referred to was long prior to the transaction in controversy, at a time when no claim was made that the firm of T. Mitchell & Co. was insolvent, and was at a time when the defendant bank was still loaning money to T. Mitchell & Co. (Defendant's exception No. 35.)

(38) The Court erred in compelling defendant's witness Bruning to testify on cross-examination, over defendant's objection, as follows:

"Q. Had you made any inquiry of these men (referring to the members of the copartnership of T. Mitchell & Co.) up to the 31st as to what property they had or what chance they had of paying anything outside of these mining operations?

!(Defendant objects as immaterial. Overruled. Exception.)

A. No.

Q. You were depending altogether upon the success of that mining venture?

A. Certainly."

as said evidence was wholly immaterial and was intended to prejudice the jury and to convince them that the defendant bank was merely gambling when it loaned money to the firm of T. Mitchell & Co. (Defendant's exception No. 36.)

(39) The Court erred in requiring defendant's witness Bruning, on cross-examination, over defendant's objection, to answer the following question:

"Q. If you saw one or more of them (referring to checks passing through the bank) you knew that

that was for a labor debt from Mitchell & Co. to a laborer, didn't you?

A. No.

Q. Isn't it marked right on the check?

A. I don't know.

Q. Didn't I show them to you and didn't you look at them?

(Defendant objects as immaterial. Overruled. Exception.)

A. I saw some checks there; yes."

as the question was evidently intended to convince the jury that the bank knew of other indebtedness of the firm of Mitchell & Co., and that when they received the gold dust in question they applied it on Mitchell & Company's account for the purpose of securing a preference over other creditors. (Defendant's exception No. 37.)

(40) The Court erred in refusing to sustain defendant's objection to the question propounded to the defendant's witness Bruning on cross-examination, referring to the checks that were alleged to have been turned down by the defendant bank before the 31st day of July 1913, as follows:

"Q. Now, when that officer came in there with an attachment, you knew that the Independent Lumber Company has a claim of four hundred dollars and over, didn't you?

A. In the evening they served me with a garnishment.

Q. You knew it then, and you knew that before,

that Mr McLean had a check for four hundred dollars that you turned down and refused to pay, didn't you?

(Defendant objects on the ground that the witness has testified that he knew nothing about that. Overruled. Exception.)

Q. Didn't you know that?

A. I told you I did not know that McLean presented a check for four hundred dollars."

as no evidence has been introduced, or was introduced, to show any such transaction, and said question merely tended to prejudice the jury against the defendant. (Defendant's exception No. 38.)

Exceptions to Instructions Given and Refused.

(41) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury its proposed instruction as follows:

A deposit consists of the delivery by any person to a bank of money, or its equivalent, for the purpose of having the same retained by said bank, with the duty on the part of the bank to credit the person so leaving the money, or its equivalent, with said bank. Deposits may be general or special. In case of a general deposit, the moment the money is delivered to the bank it becomes the property of the bank and the relation of debtor and creditor then exists between the bank and the depositor, and the bank is thereupon liable to such person so depositing said money for the value thereof, and the person so depositing the same may withdraw the same in a variety

of ways, among which is drawing checks against said deposit, which checks the bank is obliged to pay unless, among other things, it has not sufficient funds to the credit of the drawer of the check to pay the whole check, or said bank has appropriated said money for payment of a debt from the depositor to the bank, or has a lien thereon for overdue indebtedness from the depositor to the bank, and the bank is not obligated in any way to pay orders against said deposit in whatsoever form they may be presented to the net credit balance standing on the books of the bank in favor of said depositor.

(Defendant's exception No. 43.)

(42) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

You are instructed that, if you find from the evidence in this case that the proceeds of the gold dust sold to the bank on the afternoon of 31 July 1913 were credited to the deposit account of T. Mitchell & Co. at the time of such sale, then the bank had an absolute right to set off the indebtedness of said T. Mitchell & Co. to it against the amount thus deposited, and such set-off could be made immediately upon the ascertaining of the amount of the purchase price of said gold dust and the crediting of the same to the deposit account of said T. Mitchell & Co., regardless of whether or not said T. Mitchell & Co. were insolvent, or whether or not, at the time of said set-off, the

bank had reasonable cause to believe that said T. Mitchell & Co. were insolvent.

(Defendant's exception No. 43.)

(43) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

The instructions given to you relative to preference and the right of a trustee in bankruptcy to recover a preference must be taken subject to the right of the bank to set off the deposits to the credit of an insolvent person or firm against the overdraft or notes of said bank due to said bank; and, in connection with the right of set-offs, I instruct you that, in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid.

(Defendant's exception No. 43.)

(44) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

You are instructed that, if at the time of the insolvency of any person, firm, or corporation, said bankrupt has a deposit in a bank and is indebted to the bank for notes or overdrafts, the bank has an absolute right to set off the notes and overdrafts held by it against said account, and if the bank did not do so, it is the duty, under the bankruptcy law, of the referee in bankruptcy to ascertain the state of said

account and to strike said balance, and to set off said notes or overdrafts against said deposit account.

(Defendant's exception No. 43.)

(45) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

Money which is turned over to an officer of a bank without any request that it be kept separate from the other funds of the bank, and which is entered upon the books as a general deposit, and a certificate of deposit issued for the amount, or an entry thereof made upon the general account of such depositor, if he has an account with said bank, is a general deposit, and is not in any sense a special deposit. A deposit has been further defined as the thing or the sums received from the depositor, and a deposit in a bank is presumed to be a general deposit, in the absence of an agreement to the contrary. The purpose and terms of a deposit may be explicitly stated or the intention of the parties may be inferred from their declarations considered in connection with their conduct and all the circumstances.

(Defendant's exception No. 43.)

(46) The Court erred in refusing to instruct the jury and in overruling the defendant's motion to give to the jury defendant's proposed instruction as follows:

I instruct you that any delivery of money by a person to a bank, to be placed to his credit, is subject to

check within the meaning of said expression, unless received and accepted by said bank as a special deposit in some form, not to be drawn against by check, and the right to check against said account is not an absolute right, even though said money is deposited subject to check, unless, after the making of said deposit, there is a credit balance in favor of said depositor, after the payment of any overdrafts that said depositor may have had and the charging against said account of any matured or overdue notes held by such bank against said depositor, and his right to draw out a sum of money equal to the amount deposited is limited by the right of the bank to set off its indebtedness against said amount so deposited, as you have been heretofore instructed.

(Defendant's exception No. 43.)

(47) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

You are instructed that, where a bank holds a depositor's note, it has a right, at any time during the day on which said note falls due, or thereafter, to apply funds in its hands belonging to the maker of such note to the payment thereof, even where nothing will be left to the maker's credit to apply on checks.

(Defendant's exception No. 43.)

(48) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

I instruct you that the enforcement by a bank of

its lien or right of set-off by applying deposits, honestly made in the due course of business and without intent on the part of the depositor to prefer the bank, to the payment of the depositor's overdrafts and his notes in the bank's favor, as they mature, does not, although within four months of the bankruptcy proceedings against such depositor, constitute a preference forbidden by the National Bankruptcy Act, there being nothing in section 68 of said act which prevents the parties from voluntarily doing before the petition is filed what the section itself requires to be done after the proceedings in bankruptcy are instituted.

(Defendant's exception No. 43.)

(49) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

I instruct you that, if you are satisfied from the evidence in this case that the defendant bank made certain loans and permitted certain overdrafts to the firm of T. Mitchell & Co. between their second and third clean-ups, upon the promise and agreement on the part of the said T. Mitchell & Co. that they would deliver to said defendant bank the gold dust derived from the next cleanup, to secure or pay said loans and advances, then I instruct you that the transaction should be considered as the taking of security by said bank for a present loan or consideration, and the payment of said loan and advances by the delivery of said gold dust in accordance with the agreement, if

you find such agreement was had, is not such a payment as would constitute a preference in the contemplation of the National Bankruptcy Act.

(Defendant's exception No. 43.)

(50) The Court erred in giving to the jury its instruction No. 10, which was as follows:

The Court instructs the jury that the word "insolvent" as used in the pleadings in this case, means that on the 31st day of July, 1913, the aggregate of all the property belonging to the copartnership firm of T. Mitchell & Co., and that of T. Mitchell, J. J. Fallon, and Herman Fawcett, the individuals composing such firm, was not sufficient at a fair valuation to pay the debts of such copartnership firm.

The phrase "reasonable cause to believe the transfer would effect a preference" means, as applied to the pleadings and evidence in this case, that at the time of such set-off by the defendant bank, some one or more of its officers had knowledge concerning the financial affairs of said copartnership firm of T. Mitchell & Co., sufficient to induce the belief in their minds of the insolvency of said firm, and that such set-off would effect a preference in its favor over other creditors. Actual knowledge of insolvency and that the set-off would enable the bank to get a greater percentage of its debt than other creditors of the same class might or could get, is not necessary or required under the bankruptcy law, but "reasonable cause to believe" such insolvency and preference is

all that the plaintiff is bound to establish by a preponderance of the evidence.

and in overruling defendant's objection thereto, which was as follows:

Excepts to Instruction No. 10 given by the Court, for the reason that no question of solvency or insolvency is involved in the case at bar, and is not, and could not be, involved in any issue arising out of the provisions of section 68 of the National Bankruptcy Act, relative to set-offs; and the right of set-off, under the National Bankruptcy Act, does not depend, in any degree or at all, upon any knowledge or belief of the party making such set-off,—in this case the defendant bank,—as to whether or not the other party to the set-off is or is not insolvent, or whether or not the set-off would effect a preference in favor of the party making such set-off.

(Defendant's exception No. 44.)

(51) The Court erred in giving to the jury its instruction No. 13, which was as follows:

If the jury finds from the evidence that on the 31st of July, 1913, the firm of T. Mitchell & Company did not make a deposit subject to check as hereinafter defined to you in these instructions, but did make a payment of a past due indebtedness, and that at that time the firm of Mitchell & Company was insolvent, and that said defendant bank had reasonable cause to believe that by accepting a payment it would secure an unlawful preference and by so doing would secure a larger percentage of its debt than other creditors of the same class, then I instruct you such a payment, if you find it to be a payment, would be an un-

lawful preference, and your verdict should be for the plaintiff.

and in overruling defendant's objection thereto, which was as follows:

Excepts to Instruction No. 13 given by the Court, for the reason that said instruction is an erroneous statement of the law, in that it limits the right of a bank to set off indebtedness of one of its customers against a deposit account "subject to check."

(Defendant's exception No. 44.)

(52) The Court erred in refusing to give, as a part of Instruction No. 8, (which was a part of the instructions proposed by the defendant,) and which instruction, as given, was as follows:

You are instructed that, in considering whether or not a deposit in the general account of T. Mitchell & Company was made in the defendant bank on the afternoon of July 31st, 1913, you have a right to consider all the circumstances connected with the transaction.

the additional portion thereof, eliminated by the Court, which followed immediately after the word "transaction" in the instruction as given, and which said additional portion read as follows:

And also the nature of the transaction concerning the sale of the two clean-ups theretofore sold to the bank by said T. Mitchell & Co., and the treatment by all parties of the proceeds of such sale, whether as deposits or otherwise, in the general account of said T. Mitchell & Co."

(Defendant's exception No. 45, c)

(53) The Court erred in refusing to give and in eliminating from defendant's proposed instruction, partially given in this cause as Instruction No. 11, after the words "debtor's insolvency", the following clause, to wit:

And if you find from the evidence that the defendant in this case may have had some suspicion in regard to the insolvency of the firm of T. Mitchell & Co., that, in itself, is not sufficient.

Said instruction as given, after the elimination of said clause being as follows:

I instruct you that the burden is on the plaintiff in this action to prove by a preponderance of the evidence every essential fact necessary to constitute his cause of action, and if you find that the evidence introduced by the plaintiff to prove any of the material allegations of his complaint merely creates a suspicion or doubt in your minds but does not satisfy your minds by a preponderance of evidence, then you are to disregard said evidence if unsupported by evidence that does produce conviction; and I further instruct you that a transfer can not be avoided simply on proof that the creditor had doubt or suspicion that a preference was intended, for it is not enough that the creditor has some cause to suspect the insolvency of the debtor, but he must have such knowledge of fact as to induce a reasonable belief of his debtor's insolvency. And if the evidence introduced by the plaintiff in regard to knowledge or information pos-

sessed by the defendant shows that the defendant in this action may have had some suspicion in regard to the insolvency of T. Mitchell & Company, but that it did not have any reasonable cause to believe that the deposit made by said T. Mitchell & Company, if you find that such a deposit was so made by said T. Mitchell & Company, would effect a preference in favor of said bank, then I instruct you that your verdict must be for the defendant.

(Defendant's exception No. 45, d.)

Amendment of Answer.

(54) The Court erred in refusing, subsequent to the rendition of the verdict and prior to the argument for a judgment notwithstanding the verdict, and the motion for a new trial, to permit the defendant to amend paragraph 1 of its answer to plaintiff's amended complaint to conform to the evidence in said cause, by changing the words of the date therein when said set-off was made against said account from "1 August 1913" to 31 July 1913, and to amend paragraph 4 of its affirmative answer to conform to the evidence, by changing the words "1 August 1913" to "31 July 1913," and to amend paragraph 5 of its affirmative answer to conform to the evidence, by changing the words "1 August 1913" to "31 July 1913"; all on the ground that the evidence introduced showed that the date "1 August 1913" was erroneously given in said answer when it should have been "31 July 1913." (Defendant's exception No. 49.)

Form of Judgment.

(55) The Court erred in refusing to cause to be

inserted in the formal judgment entered in this cause, as a part of the verdict of the jury therein set forth, special interrogatories No. 2 and No. 3, which were unanswered by the jury, and upon which interrogatories the jury disagreed and failed to answer and returned into Court unanswered, said interrogatories being as follows:

(2) Question. Were the proceeds of said purchase deposited to the general bank account of Mitchell & Co., at the time of said purchase?

Answer.

(3) Question Did the defendant bank, at the time it credited the value of said gold dust to the deposit account of Mitchell & Co., set off the amount of the overdraft due from Mitchell & Co., and their then past-due notes against said deposit account?

Answer.

(Defendant's exception No. 50.)

Dated at Fairbanks, Alaska, on this 12 day of April, A. D. one thousand nine hundred sixteen.

JOHN K. BROWN

McGOWAN & CLARK,

Attorneys for Defendant and Plaintiff in Error

Due service of the foregoing is hereby admitted this 12th day of April, 1916.

THOMAS A. MARQUAM

LOUIS K. PRATT

Attorneys for Plaintiff and Defendant in Error

(Indorsed: "Filed in the District Court Territory of Alaska 4th Div. April. 12, 1916 J. E. Clark Clerk by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Petition for Writ of Error.

The American Bank of Alaska, a corporation, defendant in the above entitled action, feeling itself aggrieved by the general verdict of the jury rendered herein on the 3d day of November, 1915, and the special verdict of said jury on special findings of fact likewise returned and filed herein on said 3d day of November 1915, and the judgment of the Court made and entered herein in pursuance of said verdict on the 18th day of March 1916, against the defendant herein, for the sum of three thousand seven hundred fifty and 27-100 dollars and for costs of suit.

Now comes Messrs. McGowan & Clark and John Knox Brown, Esq., attorneys for defendant, and petition this honorable Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, according to the laws in that behalf made and provided;

And whereas said defendant desires a stay of execution pending the hearing of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit;

Now, therefore, said defendant petitions that an order be made, fixing the amount of the security which shall be given and furnished on the said writ

of error to cover the costs incurred therein and as a supersedeas, and that, on the giving of such security, all further proceedings of this Court herein may be suspended and stayed, until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

JOHN K. BROWN,

McGOWAN & CLARK,

Attorneys for Defendant.

Due service hereof admitted this Apr. 12, 1916.

THOMAS A. MARQUAM,

and

LOUIS K. PRATT,

Attorneys for Plff.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Order Allowing Writ of Error and Fixing Supersedeas and Cost Bond.

On motion of Messrs. McGowan & Clark, and John Knox Brown, attorneys for defendant, and the filing of a petition for writ of error and assignment of error, it is hereby ordered that a writ of error be, and the same is hereby, allowed, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, the judgment

heretofore made and entered herein on the 18th day of March 1916, and that the amount of the bond on said writ of error be, and the same is hereby, fixed at the sum of five thousand (\$5,000.00) dollars, to cover supersedeas and costs of defendant in error.

Done at Fairbanks, Alaska, on this 12 day of April 1916.

CHARLES E. BUNNELL,
District Judge.

Due service hereof admitted this 12 day of April 1916.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Plaintiff.

Entered in Court Journal No. 13, Page 508.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div. Apr 12, 1916 J. E. Clark, Clerk, By Sidney Stewart, Deputy.")

[Title of Court and Cause.]

**ORDER RELATIVE TO SUPERSEDEAS BOND
ON WRIT OF ERROR.**

The defendant having on this day filed its petition for writ of error from the verdict and judgment thereon made and entered herein on the 18th day of March 1916 to the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, to-

gether with an assignment of error, within due time, and also praying that an order be made, fixing the amount of security which defendant shall give and furnish on said writ of error, and that, on the giving of such security, all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals, and said petition having been this day duly allowed and supersedeas and cost bond fixed;

Now, therefore, it is ordered that, upon defendant filing with the clerk of this Court a good and sufficient bond in the sum of five thousand (\$5,000.00) dollars, conditioned as a cost and supersedeas bond, all as provided by law, which said bond shall be approved by this Court, then and thereafter all proceedings in this Court shall be, and they are, suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California.

Dated at Fairbanks, Alaska, this 12th day of April, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,
District Judge.

Due service of the foregoing order admitted this 12 day of April, 1916.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Plaintiff.

Entered in Court Journal No. 13, Page 508.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark. Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Writ of Error.

United States of America,
Territory of Alaska,—ss:

The President of the United States of America to the Honorable Charles E. Bunnell, Judge of the United States District Court for the Territory of Alaska, Fourth Judicial Division, Greeting:

Because in the records and proceedings, as also in the rendition of a judgment, dated the eighteenth day of March, A. D. one thousand nine hundred sixteen, of a plea which is in said United States District Court for the Territory of Alaska, Fourth Judicial Division, before you, between G. Johnson, as Trustee in Bankruptcy in the Matter of T. Mitchell & Co., a mining copartnership consisting of Thomas Mitchell, Jas. J. Fallon, and Herman Fawett, Bankrupts, as plaintiff, and The American Bank of Alaska, a corporation, as defendant, manifest error hath happened, to the great prejudice and damage of said American Bank of Alaska, as is said and appears in the petition herein:

We, being willing that error, if any hath been, shall be duly corrected and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if said judgment be therein given, then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, together with this writ, so as to have the same at said place, in said Circuit Court, on the 12 day of May, A. D. one thousand nine hundred sixteen, that, the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct such error what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 12 day of April, A. D. one thousand nine hundred sixteen.

Attest my hand and the seal of the United States District Court for the Territory of Alaska, Fourth Judicial Division at the Clerk's office in the town of Fairbanks, Alaska on this 12 day of April, A. D. one thousand nine hundred sixteen.

(Seal.)

J. E. CLARK,

Clerk of the District Court for the Territory of Alaska, Fourth Division.

Allowed this 12 day of April, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,
Judge of the District Court for the Territory of
Alaska, Fourth Division.

Due service of the foregoing writ of error admitted this 12 day of April, A. D. one thousand nine hundred sixteen.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Defendant in Error.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., April 12 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")
[Title of Court and Cause.]

Citation on Writ of Error.

The President of the United States of America to G. Johnson, as Trustee in Bankruptcy in the Matter of T. Mitchell & Co., a mining copartnership consisting of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, Bankrupts, and to Louis K. Pratt, Esq., and Thomas A. Marquam, Esq., his Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco, State of California, within thirty days from the date of this citation, pursuant to the writ of error filed in the office of the Clerk of the United States District

Court for the Territory of Alaska, Fourth Judicial Division, wherein the American Bank of Alaska, a corporation, is plaintiff in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in error in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America, on this twelfth day of April, A. D. one thousand nine hundred sixteen, and in the year of our Independence the one hundred fortieth.

Attest my hand and the seal of the above-named District Court, at Fairbanks, Alaska, on this twelfth day of April, A. D. one thousand nine hundred sixteen.

(Seal.)

CHARLES E. BUNNELL,

District Judge.

Due service of the foregoing citation admitted this 12 day of April, A. D. one thousand nine hundred sixteen.

THOMAS A. MARQUAM,

and

LOUIS K. PRATT,

Attorneys for Defendant in Error.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Supersedeas Bond on Writ of Error.

Know all men by these presents that we, The American Bank of Alaska, a corporation, as principal, and A. Bruning, and Paul Hopkins, as sureties, are held and firmly bound unto the defendant in error, G. Johnson, as Trustee in Bankruptcy in the Matter of T. Mitchell & Co., a mining co-partnership consisting of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, Bankrupts, in the just and full sum of five thousand (\$5,000.00) dollars, to be paid to the said defendant in error, his successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors in interest, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 12 day of April, A. D. one thousand nine hundred sixteen.

Whereas, on the eighteenth day of March, A. D. one thousand nine hundred sixteen, in the United States District Court for the Territory of Alaska, Fourth Judicial Division, a judgment was rendered against said The American Bank of Alaska, a corporation, and the said defendant having obtained a writ of error and filed a copy thereof in the office of the Clerk of said Court, to reverse the judgment aforesaid, and a citation directed in said action to G. Johnson, as Trustee in Bankruptcy in the Matter of T. Mitchell & Co., a mining co-partnership consisting of Thomas Mitchell, Jas. J. Fallon, and Herman Fawcett, Bankrupts, citing and

admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, on the 12 day of May, A. D. one thousand nine hundred sixteen and whereas the plaintiff in error desires a stay of execution in the above entitled action pending the above mentioned appeal, now the condition of the foregoing obligation is such that, if the said The American Bank of Alaska, a corporation, shall prosecute said writ of error to effect and answer and pay all judgments, damages, and costs, if it fail to make its said plea good, then the foregoing obligation to be void, otherwise to remain in full force, effect, and virtue.

THE AMERICAN BANK OF ALASKA,

Princial.

By C. J. HURLEY.

A. BRUNING, Surety.

PAUL HOPKINS, Surety.

United States of America,
Territory of Alaska,—ss:

A. Bruning and Paul Hopkins, being first duly sworn according to law, each for himself and not one for the other on his oath deposes and says: I am one of the sureties on the foregoing bond; I am not an attorney at law, United States marshal, deputy marshal, clerk, commissioner, or other officer of any Court, and I am worth the sum of five

thousand (\$5,000.00) dollars, over and above all my just debts and liabilities, in property not exempt from execution.

A. BRUNING.

PAUL HOPKINS.

Subscribed and sworn to before me this 12 day of April 1916.

(Seal.)

JOHN A. CLARK,

Notary Public in and for the Territory of Alaska.

My commission expires Apr. 24, 1918.

Approved this 14th day of April, 1916.

CHARLES E. BUNNELL,

District Judge.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 14, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

Designation of Place for Hearing of Writ of Error.

To the Honorable Charles E. Bunnell, Judge of the above-entitled Court, and to the Plaintiff and his Attorneys:

Comes now the defendant, plaintiff in error, in the above entitled cause, and, pursuant to the provisions of the act of Congress, giving the designation of the place of hearing on writs of error to the plaintiff in error, does hereby designate the city and county of San Francisco, State of California, as the place for the hearing of the writ of error in the above entitled action.

Dated at Fairbanks, Alaska on this 12 day of April, A. D. one thousand nine hundred sixteen.

JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant.

Due service of the foregoing is hereby admitted this 12 day of April, A. D. 1916.

THOMAS A. MARQUAM,
and
LOUIS K. PRATT,
Attorneys for Plaintiff.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

[Title of Court and Cause.]

**Order Extending Time Within Which to File and
Docket Cause on Writ of Error.**

This matter coming on for hearing on the motion of the defendant above named, the plaintiff in error, for an order extending the time within which to file and docket the record herein on writ of error with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, and it appearing to the satisfaction of this Court that the time allowed by law and the orders of this Court allowing said writ of error is insufficient for the purpose, that the transcript and record is to be printed at Fairbanks, Alaska, and that the plaintiff in error desires an

extension to time until and including the thirty-first day of July, A. D. one thousand nine hundred sixteen, within which to file and docket said cause as aforesaid, and all and singular the matters being fully understood and considered by this Court.

It is therefore ordered that the plaintiff in error be, and it is hereby, given and granted until and including the thirty-first day of July, A. D. one thousand nine hundred sixteen, within which to file and docket its record on writ of error with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California.

Done in open Court at Fairbanks, Alaska, on this 12 day of April, A. D. one thousand nine hundred sixteen.

CHARLES E. BUNNELL,
District Judge.

Due service hereof admitted this Apr. 12, 1916.

THOMAS A. MARQUAM,
and

LOUIS K. PRATT,
Attorneys for Plff's

Entered in Court Journal No. 13 Page 509.

(Indorsed: "Filed in the District Court Territory of Alaska, 4th Div., Apr. 12, 1916. J. E. Clark, Clerk, by Sidney Stewart, Deputy.")

In The District Court For The Territory of Alaska,
Fourth Division.

Clerk's Certificate to Record.

United States of America,
Territory of Alaska,
Fourth Division.—ss:

I, J. E. CLARK, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing consisting of 264² pages, numbered from 1 to 264², inclusive, constitute a full, true and correct transcript of the record on Writ of Error in cause No. 2011, entitled, G. Johnson as trustee in bankruptcy, in the matter of T. Mitchell & Company a mining copartnership, consisting of Thomas Mitchell, James J. Fallon and Herman Fawcett, bankrupts, Plaintiff, vs. The American Bank of Alaska, a corporation, Defendant, wherein The American Bank of Alaska, a corporation, is Plaintiff in Error, and G. Johnson as Trustee in bankruptcy in the Matter of T. Mitchell & Company a mining co-partnership, consisting of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts, are Defendants in Error, and was made pursuant to and in accordance with the Praecipe of the defendant and Plaintiff in Error, filed in this action and made a part of this Transcript, and by virtue of the Citation issued in said cause, and is the return thereof in accordance therewith.

And I do further certify that the Index thereof, consisting of pages numbered i to iii is a correct Index

file

of said Transcript of record; also that the costs of preparing said transcript and this certificate, amounting to eighty-one & 50-100 Dollars (\$81.50) has been paid to me by counsel for Plaintiff in Error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 19th day of May, A. D. 1916.

(SEAL)

J. E. CLARK,
Clerk of District Court
Territory of Alaska,
Fourth Division.

United States Circuit Court of Appeals ²

For the Ninth Circuit

THE AMERICAN BANK OF ALASKA,
Plaintiff in Error,
VS.

G. JOHNSON, as trustee in bankruptcy in the
matter of T. Mitchell & Co., a mining co-
partnership consisting of Thomas Mitchell,
Jas. J. Fallon and Herman Fawcett,
bankrupts,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

THOMAS A. MCGOWAN,
JOHN A. CLARK,
JOHN KNOX BROWN,
Fairbanks, Alaska,

Attorneys for Plaintiff in Error.

CHARLES J. HEGGERTY,
KNIGHT & HEGGERTY,
Crocker Building, San Francisco,
Of Counsel.

Filed

FEB 14 1917

F. D. Monckton,
Clerk.

Filed this.....day of February, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2815

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE AMERICAN BANK OF ALASKA,
Plaintiff in Error,

VS.

G. JOHNSON, as trustee in bankruptcy in the
matter of T. Mitchell & Co., a mining co-
partnership consisting of Thomas Mitchell,
Jas. J. Fallon and Herman Fawcett,
bankrupts,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This action was commenced by G. Johnson, asserting himself to be *trustee* for the creditors of T. Mitchell & Co., alleged bankrupts, against the American Bank of Alaska, a banking corporation, to recover the sum of \$3,750.20, alleged to be the value of certain gold dust sold and delivered on July 31, 1913, to the bank by the alleged bankrupts the value thereof to be deposited to their credit, in their general account with said bank, within four

months of the time said copartnership is alleged to have been adjudicated bankrupt. The bank's officers then were C. J. Hurley, president and manager, A. Bruning, cashier, Paul Hopkins, gold dust teller, and Paul A. Rettig, teller.

The copartnership of T. Mitchell & Co. was a mining copartnership, consisting of three members, James J. Fallon, Thomas Mitchell, and Herman Fawcett, formed about the 18th of January, 1913, at which time said copartnership took an 85-per cent lease or lay on the Hoffman Bench placer mining claim on Ester Creek, Fairbanks Recording District, Fourth Judicial District, Alaska (Tr. p. 50). Fallon had charge of the clerical work, kept the books, drew checks, purchased supplies, etc., while the others did other mining work. They commenced actual mining operations June 9, 1913 (Tr. p. 53). Fallon was the only member of the firm that then had any money (Tr. p. 54) and he put up about \$1,500.00 to start operations (Tr. pp. 50-51), and he also owned some mining property (Tr. p. 51), worth about \$1,500.00 (Tr. p. 52). An account was opened with the defendant bank on June 11, 1913, under the partnership name of "*Mitchell & Co.*" (Tr. pp. 77, and 166a, 166b) with a deposit of \$200.00, and an additional deposit of \$100.00 was made on June 19, 1913, and checks were drawn against the account until it was exhausted. On the 28th of June, 1913, the overdraft at the bank was \$6.90 (Tr. p. 131), and under permission from the bank additional checks were drawn until the first cleanup, which

cleanup was sold to the bank and deposited to the credit of the firm on the 3rd of July, 1913, the value of said cleanup being \$1,904.75 (Tr. pp. 54, 73, 130). Said cleanup was deposited and credited against the overdraft that had been growing steadily since June 28, and left an overdraft in the sum of \$155.14 (Tr. p. 130). By July 7th, the overdraft had again increased to \$795.46, at which time Mitchell & Co. executed a note to the bank in the sum of \$850.00, which amount was credited to their account and left them at the close of the day a credit of \$18.54 (Tr. pp. 131, 166a).

The second cleanup was delivered to the bank on the 16th of July, prior to which the overdraft had mounted to \$133.71 (Tr. p. 132). The amount of the cleanup was \$2,213.14 (Tr. pp. 73, 132). On the 18th of July the overdraft had mounted to \$527.69, and on the 19th of July the firm gave another note to the bank in the sum of \$500.00 (Tr. p. 133), and at the end of the same day the overdraft had increased to \$599.44 (Tr. p. 133). Mitchell & Co. were permitted to continue to overdraw as before until the next cleanup, and on the 30th of July the overdraft amounted to \$2,246.14 (Tr. pp. 133-166b). On the 31st of July the third cleanup was delivered to the bank, the amount thereof being the sum of \$3,734.12, and an additional credit was allowed Mitchell & Co. in the sum of \$16.15, making a total of \$3,750.27, proceeds of said cleanup (Tr. p. 74).

At the time the third cleanup was delivered to the bank, T. Mitchell & Co. was indebted to the bank as follows (Tr. p. 141):

Overdraft	\$2,246.14
Promissory note credited June 8, 1913	850.00
Promissory note credited July 19, 1913	500.00

and another note the exact amount of which does not appear, but which was in excess of \$160.00, presumably a note for \$200.00 deposited June 11, 1913, as shown in bank book (Tr. p. 77).

(MEMO. The first item of deposit of \$400.00, as shown in Defendant's Exhibit 1, Transcript p. 77, is error, as it should be but \$200.00, as shown by the footings and the Plaintiff's Exhibit M, Transcript p. 166a.)

Mitchell & Co. were therefore on the 31st of July, 1913, indebted to the bank on demand notes and overdraft in a sum in excess of \$3,750.27 (Tr. p. 141).

The gold dust was sold to the bank in the same manner (Tr. p. 74) that had been followed with the two previous cleanups (Tr. p. 135), was delivered to the gold dust teller, who cleaned and weighed the same, and immediately thereafter delivered to the cashier, the credit memorandum showing amount of gold dust and the value thereof at the agreed price thereof (Tr. pp. 110-112). The cashier thereafter immediately made out a charge memorandum for the bookkeeper, charging against the account of T. Mitchell & Co. the amount of the \$500.00 note (Tr. p. 75), and the \$850.00 note, and

applying the balance of the proceeds of said gold dust, to wit, the sum of \$154.13, as a credit on the smaller note then in the possession of the bank (Tr. p. 128). The bank closed at 3 p. m., but as is the custom in Fairbanks during the sluicing season, gold dust is received at any hour that any of the employees are in the bank. The books are closed at 3 p. m. and any deposits received, or charges made, or checks cashed, are then entered but entered on the books and records as a part of the next day's business (Tr. pp. 113-114). The gold dust was received at about 5 p. m. or a little later on July 31, 1913, and was cleaned, weighed, the value ascertained, the charge and credit slips were then made and filled out and placed in the bookkeeper's files for the attention of the bookkeeper on the next day, all before 6 p. m. on the 31st day of July (Tr. pp. 121, 146), although because these matters occurred after 3 p. m. on the 31st of July, the actual entries of these transactions by the bookkeeper in the individual ledger were not made until the next day and were then made under the date of August 1, 1913 (Tr. pp. 121, 169).

The note for \$500.00 under date of July 19, 1913, was the personal note of Mr. Bruning, cashier of the bank, and a personal friend of Fallon's, proceeds of which were deposited to credit of T. Mitchell & Co. to take up their overdraft and to help them out until the next cleanup (Tr. 133) and the cashier's memo for the bookkeeper shows

that \$500.00 was a refund to Mr. Bruning for the cash advanced by him.

All of the moneys represented by the original deposits, the notes, and overdrafts, went to pay laborers and other creditors (Tr. p. 67), who are now represented by the trustee and who seek to recover from the bank the amount received by the bank to repay it for such advancements, the benefits of which had already been received by the creditors. It was upon the representation that this cleanup would come to the bank that the bank had honored the checks and allowed the overdrafts (Tr. p. 150).

Between 8 p. m. and 9 p. m. on the 31st of July a garnishment was served on the bank in an action instituted by Rutherford and Widman against T. Mitchell & Co. (Tr. p. 120). The garnishment was served several hours after the credit and charge memos were prepared and placed in the book-keeper's files for entry by him on the next day (Tr. p. 121). After the service of the garnishment, the bank made answer that there was nothing to the credit of T. Mitchell & Co. (Tr. pp. 93-94) and thereafter refused to honor any further checks or permit any further overdraft, balanced up their bank book and returned same to them.

Mitchell & Co. did not consider themselves insolvent (Tr. pp. 82-83) and fully expected to continue their work, as they considered the lay valuable and that it would pay out. The ground was looking better (Tr. p. 83), and if the suit had not been started by Rutherford & Widman, thus precluding

them from securing further credit, they would have continued mining operations. Fallon indignantly denies he ever said they would or intended to shut down (Tr. p. 171). The bank did not decide to honor no more checks and not permit any overdrafts until the garnishment was served (Tr. pp. 152-153) and they then for the first time learned the financial condition of the firm. The bank had no intimation of the intention of Rutherford & Widman to institute suit. The bank made the application of the proceeds of the gold dust immediately upon ascertaining the value thereof and notified Mitchell & Co. before 6 p. m. that there was nothing to their credit (Tr. p. 101), when asked if anything could be garnisheed. The gold dust was purchased outright at a fixed valuation, to wit, at \$16.40 per oz., and was not taken subject to assay. An advance of \$3734.12 was made to their credit as soon as the dust was received, and when blown, cleaned and weighed, the additional credit of \$16.15 was given them. Later, and on August 16, 1913, 2.55 oz. of gold was recovered from the black sand from the workings of Mitchell & Co., and the value thereof, \$49.00 was credited to them and charged against the balance due on their notes. The item of black sand is not, however, included in this suit and may be disregarded.

This third cleanup was not treated by the bank any differently from the first two cleanups (Tr. pp. 63, 74) and all entries were made in the usual manner and in the due course of business of the

bank. The officers of the bank balanced up the bank book and returned same with canceled checks and note of \$850.00 charged against the account, to Mr. Fallon, and notified him that they could not carry him any further (Tr. p. 83), and returned to Bruning his note for \$500, proceeds of which had been deposited to credit of Mitchell & Co. (Tr. p. 75). The gold dust was delivered and sold to the bank in the regular course of business, in the *same* way the first and second cleanups were, and there is no pretense of fraud or collusion.

On August 23, 1913, five of the creditors of T. Mitchell & Co. filed in the District Court for the Fourth Division of Alaska a petition in involuntary bankruptcy asking that Fallon, Fawcett and Mitchell, "as copartners under the firm name and style of T. Mitchell & Co., may be adjudged by the Court to be bankrupts, within the purview of said acts" (Tr. pp. 21-24). Petitioners allege that they are creditors of said "T. Mitchell, J. J. Fallon and Herman Fawcett, copartners under the firm name and style of T. Mitchell & Co." (Tr. p. 22). They further allege that the said "T. Mitchell, J. J. Fallon, and Herman Fawcett, and as such firm of T. Mitchell & Co., are insolvent" (Tr. p. 23), "and that within four months next preceding the date of this petition the said T. Mitchell, J. J. Fallon, and Herman Fawcett, as such firm of T. Mitchell & Co., and individually, committed an act of bankruptcy", etc. (Tr. p. 23), by admitting in writing their inability individually and as a partnership to pay

their debts and expenses, and willingness to be adjudged bankrupts, etc. (Tr. p. 23), and to the petition is appended a communication to that effect, signed by the copartnership as such and by each partner as an individual (Tr. p. 25).

On September 26, 1913, an instrument was filed in said cause, purporting to be schedules in bankruptcy, entitled "In the matter of T. Mitchell & Co., a mining copartnership composed of Thomas Mitchell, James J. Fallon, and Herman Fawcett, bankrupts" (Tr. pp. 28-29). Each schedule is signed "Thomas Mitchell, Herman Fawcett, James J. Fallon, debtors", and has no other signatures of any description. Schedule A-3 (Tr. p. 30) refers to the claim of the plaintiff in error and gives the amount thereof as \$345.87, stating that it was for "cash advanced for the mining partnership of T. Mitchell & Co." (Tr. p. 30). This item is followed by a note explaining the application of the proceeds of the gold dust derived from the third cleanup against overdue notes and overdraft, and after alleging the indebtedness to the bank in the sum of \$4095.87 on the 31st of July, 1913, and the taking of the gold dust to the bank on the 31st of July, 1913, states: "and that said bank applied said sum of \$3750.27 in payment of their indebtedness as above stated; but did not place the same to the credit of said bankrupts so that said bankrupts could check against the same, and that said bankrupts were not permitted to check against any part of said sum of \$3750.27" (Tr. pp. 30, 31). At the end of

Schedule A Mitchell, Fawcett and Fallon swear to the schedule "as members of the mining copartnership of T. Mitchell & Co." and "declare the said schedule to be a statement of all the partnership debts of T. Mitchell & Co.", etc. (Tr. p. 32). Schedule B-1 contains a statement that the partnership owns no real estate and then gives a description of some mining property owned by James J. Fallon, as individual, of the value of \$1,000 (Tr. pp. 32-33). In Schedule B-2 is listed certain personal property of T. Mitchell & Co., on Ester Creek, under attachment in the said case of Rutherford et al. v. T. Mitchell & Co., of the estimated value of \$1886. Under subdivision 'm' of said schedule they allege that debtors have no personal property of any description "except as above stated" (Tr. pp. 33-34). Then follows a note as follows: "Said firm of T. Mitchell & Co. deposited with the American Bank of Alaska on the 31st day of July, 1913, gold dust mined from said Hoffman Fraction to the value of \$3750.27, which gold dust was by the bank applied to the indebtedness then past due from said T. Mitchell & Co., which indebtedness consisted of \$1350 in promissory notes and \$2745.87 in an overdraft; but no part of the proceeds of said gold dust was by said bank placed on deposit for said T. Mitchell & Co., and was at no time subject to be checked against by said T. Mitchell & Co." (Tr. p. 34). In *no place* in the schedules is it alleged that there is *any claim against the bank, or that the bank has in its possession any property of the*

bankrupts, whoever they may be, and *said gold dust is not listed* as an asset at any place in the schedules or recapitulation.

On the 30th of September, 1913, an *alleged* adjudication in bankruptcy was signed by the Court, entitled, "In the Matter of T. Mitchell & Co., a Mining copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, Bankrupts" (Tr. 39 and 40), and which reads as follows:

"At Fairbanks, in said Division, on the 30th day of September, A. D. 1913, before the Honorable Frederic E. Fuller, judge of the said Court in bankruptcy, the petition of James G. McCann and others that Thomas Mitchell, James J. Fallon, and Herman Fawcett, copartners under the firm name of T. Mitchell & Co., be adjudged bankrupts, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Thomas Mitchell, James J. Fallon, and Herman Fawcett, copartners doing business under the firm name and style of 'T. Mitchell & Co.', are hereby declared and adjudged bankrupt accordingly.

"Done in open Court this 30th day of September, A. D. 1913.

"F. E. Fuller, District Judge"

(Tr. pp. 39-40).

On the same day an instrument designated as an "order of reference" was signed by the Court, entitled "In the Matter of T. Mitchell & Co., a mining copartnership composed of Thomas Mitchell, James J. Fallon, and Herman Fawcett, Bankrupts", and which reads as follows:

“Whereas, Thomas Mitchell, James J. Fallon and Herman Fawcett, copartners under the firm name and style of T. Mitchell & Co., of the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, on the 30th day of September, A. D. 1913, were duly adjudged bankrupts upon a petition filed in this Court against them on the 25th day of August, 1913, according to the provisions of the Acts of Congress relating to bankruptcy; it is, therefore,

Ordered that said matter be referred to W. H. Adams, referee in bankruptcy of this Court to take such further proceedings therein as are required by said acts and that the said Thomas Mitchell, James J. Fallon and Herman Fawcett shall attend before said Referee on the 16th day of October, 1913, at Fairbanks, Alaska, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said Bankruptcy.

Done in open Court this 30th day of September, A. D. 1913.

F. E. Fuller, District Judge”

(Tr. pp. 40-41).

Thereafter, and on the 16th day of October, 1913, W. H. Adams, referee in bankruptcy, signed an instrument purporting to be an “appointment of trustee by referee”, entitled as follows: “In the Matter of T. Mitchell & Co., Bankrupts”, and which reads as follows:

“At Fairbanks in said district on the 16th day of October, A. D. 1913, before W. H. Adams, referee in bankruptcy,

This being the day appointed by the Court, for the first meeting of creditors under the said bankruptcy, and of which due notice has been given in the Fairbanks Daily Times, a newspaper of general circulation published in said

district, I, the undersigned referee of the said Court in bankruptcy, sat at said time and place above mentioned, pursuant to such notice, to take the proof of debts, and for the choosing of a trustee, under the said bankruptcy.

And I do hereby certify that the creditors whose claims had been allowed, and who were present duly represented, failed to make choice of trustee of said bankrupt estate,

And, therefore, I do hereby appoint G. F. Johnson, of the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, as trustee of the same; and the creditors being then and there present whose claims had been allowed, agreed that the bond of such trustee be fixed in the sum of One Thousand Dollars, which said sum of One Thousand Dollars is hereby fixed as the bond to be given by such trustee herein.

W. H. Adams,
Referee in Bankruptcy.

(Tr. pp. 45-46).

On the same day apparently, G. F. Johnson signed a purported notice of acceptance, entitled and reading as follows:

“In the Matter of T. Mitchell & Co., Bankrupts.—In Bankruptcy.—

Notice of acceptance by trustee.

To W. H. Adams, referee in bankruptcy on said Court:

You are hereby notified that I do hereby accept the office of Trustee in the above entitled matter.

Dated: At Fairbanks, Alaska, October 16, 1913.

G. F. Johnson”

(Tr. p. 45).

On the same day said Johnson filed what purported to be a bond of trustee "In the Matter of T. Mitchell & Co., Bankrupts", wherein, as a recital of the condition of the bond appears the following:

"Whereas, the above named G. F. Johnson was, on the 16th day of October, A. D. 1913, appointed trustee in the case pending in bankruptcy in said Court, wherein Thomas Mitchell, James J. Fallon and Herman Fawcett are the bankrupts, and, he, the said G. F. Johnson has accepted said trust and all the duties and obligations pertaining thereto.

Now, therefore, if the said G. F. Johnson, trustee as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupts which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as such trustee, then this obligation to be void; otherwise to remain in full force and virtue" (Tr. pp. 47-48).

On October 17, 1913, the referee in bankruptcy signed an order entitled "In the Matter of T. Mitchell & Co., Bankrupts", which purports to be an order approving bond of trustee and which reads as follows:

"It appearing to the Court that G. F. Johnson of Fairbanks Precinct in said District has been duly appointed trustee of the estate of the above named bankrupt and has given a bond with sureties for the faithful performance of his official duties, in the amount fixed by the Court and consented to by the creditors to wit: in the sum of One Thousand Dollars,

it is ordered that the said bond be, and the same is hereby approved.

Dated Fairbanks, Alaska, October 17, 1913.

W. H. Adams,
Referee in Bankruptcy.

(Tr. pp. 46-47).

The Pleadings.

Thereafter this action was instituted and the defendant interposed a *demurrer* to the plaintiff's complaint, which was sustained, and on the 18th of June, 1914, an amended complaint was filed (Tr. pp. 4-7), to which defendant interposed a *general demurrer* (Tr. p. 10), which demurrer was overruled (Tr. p. 11), and thereafter an answer to the complaint (Tr. pp. 11-15), and a supplemental answer were filed (Tr. p. 16); plaintiff then filed a reply (Tr. pp. 17-18).

The *pleadings*, with the various paragraphs of the amended complaint, the answer and supplemental answer thereto, and the reply to the affirmative matter in the complaint, so grouped as to be readily understood, are as follows:

Amended Complaint:

Comes now the plaintiff above named, and, by leave of Court first had and obtained, files this, his amended complaint in the above entitled cause, and alleges:

Par. 1. That T. Mitchell & Co. were, on the thirty-first day of September, a mining co-partnership, composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, and

were, on the 30th day of September, 1913, by the above entitled court, adjudged to be bankrupts upon petition of creditors of said T. Mitchell and Co., and that the proceedings in bankruptcy were duly referred to W. H. Adams, referee in bankruptcy, residing in Fairbanks, Fourth Judicial Division, Territory of Alaska, and that said bankruptcy proceedings are still pending in the bankruptcy court of said referee (Tr. pp. 4-5).

Par. 2. That thereafter and prior to the commencement of this action, such proceedings were had before said referee, that plaintiff was duly and regularly, by said referee, appointed trustee in bankruptcy in said bankruptcy proceedings, and that the plaintiff is now the duly appointed, qualified and acting trustee in bankruptcy, and as such trustee is entitled to the possession of all of the estate of said T. Mitchell and Co. (Tr. p. 5).

Supplemental Answer:

Denies each and every matter and thing contained in paragraphs one and two of said amended complaint, save and except that defendant admits that T. Mitchell and Company, on the thirty-first day of December, A. D. one thousand nine hundred thirteen, was a mining copartnership composed of Thomas Mitchell, James J. Fallon, and Herman Fawcett (Tr. p. 16).

Amended Complaint:

Par. 3. That the defendant is a corporation duly organized and existing under the laws of the State of Washington; that its principal place of business is at the town of Fairbanks, Fourth Judicial Division, Territory of Alaska (Tr. p. 5).

Par. 4. That within four months prior to the date of said order of adjudication, adjudging said T. Mitchell & Co. bankrupts, to wit, on the *thirty-first* day of *July*, 1913, the said firm of T. Mitchell & Co. *delivered into the possession of the defendant*, at their place of business in said town of Fairbanks, certain *gold dust* belonging to the said firm of T. Mitchell & Co., which said gold dust was then of the *value* of \$3,750.27 (Tr. pp. 5 and 6).

Par. 5. That at the *time* of the delivery of said gold dust to said defendant, as aforesaid, the said firm of T. Mitchell & Co. were *indebted to said defendant in a sum greater* than said sum of \$3750.27, to wit, in the sum of about \$4096.04, which said indebtedness was, at the time of the delivery of said gold dust, *past due* (Tr. p. 6).

Admitted by failure to answer.

Amended Complaint:

Par. 6. That said *defendant* without any authority from said T. Mitchell & Co., or from any member of said firm, *converted* said gold dust and the whole thereof to its own use, and *applied the value* thereof, to wit, the said sum of \$3750.27, *toward the payment of said indebtedness* of \$4096.04, which was *then past due and owing* from said firm of T. Mitchell & Co. to said defendant (Tr. p. 6).

Answer:

Par. 1. Denies each and every allegation contained in paragraph VI thereof, except that said defendant admits that, on or about August 1, 1913, it *set off the deposit* to the credit of T. Mitchell & Co., named in said amended complaint, which deposit was on the books of said defendant in the amount of \$3750.27, *against the past due indebtedness*

then due and owing from said firm of T. Mitchell & Co. to said defendant, in the sum of \$4096.04 besides interest thereon (Tr. pp. 11-12).

Amended Complaint:

Par. 7. That said gold dust was so delivered into the possession of defendant by said T. Mitchell & Co., as above stated, with the intention on the part of said T. Mitchell & Co. of selling the same to defendant and depositing the proceeds of such sale to their credit in their general deposit account in said defendant bank, and having the same credited to their deposit account, for the purpose of checking against the same to pay the wages of workmen, then working for said T. Mitchell & Co., as well as to pay the running expenses of the mining operations then conducted by said T. Mitchell & Co., and the said defendant unlawfully and without any right or permission, applied the whole value of said gold dust, to wit, the said sum of \$3750.27 towards the payment of said indebtedness, then past due and owing, from said T. Mitchell & Co., to defendant as above stated, and that said defendant immediately, after ascertaining the value of said gold dust, notified said T. Mitchell & Co. that it had applied the whole value of said gold dust, to wit, the said sum of \$3750.27 toward the payment of their past indebtedness, and then and there notified said T. Mitchell & Co. that they would not honor any checks against said amount, and that said T. Mitchell & Co. were not permitted by said defendant, at any time, to check against the same, and that at no time was the value of said gold dust, or any part thereof, placed to the deposit account of said T. Mitchell & Co. in the defendant bank, so as to entitle said T. Mitchell & Co. to check against the same, or any part thereof (Tr. pp. 6-7).

Answer:

Par. 2. Answering paragraph VII thereof, admits that the *gold dust* mentioned in said amended complaint was *delivered* to the defendant by said T. Mitchell & Co., *with the intention* on the part of said T. Mitchell & Co. of *selling* same to defendant *and depositing the proceeds* of such sale *to the credit* of said T. Mitchell & Co., *in its general deposit account* at the bank of said defendant, *and having same credited to the deposit account* of said T. Mitchell & Co., and this defendant denies each and every other allegation contained in said paragraph VII (Tr. p. 12).

Amended Complaint:

Par. 8. That at the time of the delivery of said gold dust to said bank, by said bankrupts, as above stated, said bankrupts, to wit: T. Mitchell & Co., composed of the firm of Thomas Mitchell, James J. Fallon and Herman Fawcett, were justly and lawfully indebted to different persons, in an aggregate sum far exceeding the value of the estate of said firm together with that of, and each of, the individual members thereof, and that said firm were, and each of its members was at said time, insolvent, and the said defendant well knew, at said time, that said firm of T. Mitchell & Co. were wholly insolvent, *or* had reasonable cause to believe that they were insolvent, and that defendant well knew at the time of receiving the said gold dust, and at the time of applying the same, or its value, to the payment of the past indebtedness then due, defendant would and did effect a preference whereby defendant would receive a larger percentage of the indebtedness due it from said bankrupts than the other creditors of the bankrupts of the same class, and that said defendant at said time had reasonable cause to believe that the application of said

gold dust, or its value to its past due indebtedness, would effect such preference, and that the same was so applied by said defendant with the purpose of procuring such preference (Tr. p. 8).

Answer:

Par. 3. Answering paragraph VIII thereof, this defendant denies any knowledge or information sufficient to form a belief as to whether or not, at the time of the delivery of said gold dust to said bank by said firm of T. Mitchell & Co., the said firm was justly and lawfully indebted to different persons, in an aggregate sum far exceeding the value of the estate of said firm, together with that of the individual members thereof; and denies any knowledge or information as to whether or not said firm was, and each of its members was, at said time, insolvent; and this defendant further denies each and every other allegation contained in said paragraph (Tr. pp. 12-13).

Amended Complaint:

Par. 9. That the entire value of the estate of said T. Mitchell and Co., bankrupts, is, and ever since, prior to the thirty-first day of July, 1913, was wholly together with the estate of each of the individual members thereof, insufficient to pay the lawful indebtedness of said firm, and that the retention by said defendant of said sum of \$3750.27 would pay to defendant a much greater percentage of the indebtedness due to defendant from said T. Mitchell & Co., than would be received by any of the other creditors of the said T. Mitchell & Co. of the same or any class (Tr. pp. 8-9).

Answer:

Par. 4. Denies each and every allegation contained in paragraph IX thereof (Tr. p. 13).

Amended Complaint:

Par. 10. That the plaintiff prior to the commencement of this action, demanded of defendant said gold dust or said sum of \$3750.27 the value thereof, but the said defendant refused to deliver said gold dust or to pay any portion of said sum to plaintiff (Tr. p. 9).

Admitted by failure to answer.

Affirmative Answer:

For a further, separate and affirmative defense to the said amended complaint, this defendant alleges:

1. That at the times mentioned in said amended complaint and herein mentioned, the defendant was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and engaged in carrying on a general banking business in the town of Fairbanks, Territory of Alaska.

2. That prior to, and some time subsequent to the first day of August, 1913, the firm of T. Mitchell & Co. was a mining copartnership, composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, engaged in carrying on a general placer mining business in the Fairbanks Mining and Recording Precinct, Fourth Judicial Division, Territory of Alaska.

3. That on the 31st day of July, 1913, the said firm of T. Mitchell & Co. was indebted to this defendant in the sum of \$4096.04 on account of overdrafts made by said firm of T. Mitchell & Co. upon its account with the said defendant, and on account of promissory notes theretofore executed by the said firm of T. Mitchell & Co., payable to this defendant, which said amount of \$4096.04 is exclusive of any interest due thereon.

4. That on or about July 31, 1913, the *said* firm of T. Mitchell & Co., *sold and delivered* to this defendant *gold dust of the value of \$3,-*

750.27 and *directed* that the *said amount* be placed to the credit of said firm upon the deposit books of this defendant, and this defendant thereupon on August 1, 1913, caused the said firm of T. Mitchell & Co. to be *credited* with said amount (Tr. pp. 13-14).

Admitted by failure to reply thereto.

Affirmative Answer:

5. That on said August 1, 1913, this *defendant*, with the knowledge and consent of the said firm of T. Mitchell & Co., *set off against the said indebtedness of said firm* of T. Mitchell & Co. to this defendant the said amount of \$3750.27, so as aforesaid deposited to the credit of said firm of T. Mitchell & Co. from the proceeds and purchase price of the said gold dust, so as aforesaid purchased from said firm by this defendant (Tr. p. 14).

Reply:

Par. 1. Replying to paragraph V of the further, separate and affirmative defense, *denies* that defendant *set off* against the said indebtedness of said firm of T. Mitchell & Co. to defendant the amount of \$3750.27, *with the knowledge or consent of said firm* of T. Mitchell & Co., or with the knowledge or consent of any member of said firm of T. Mitchell & Co., on the 1st day of August, 1913, or at any other time (Tr. pp. 17-18).

Affirmative Answer:

6. That, at the time of the setting off of said deposit to the credit of said firm of T. Mitchell & Co. against the amount of \$4096.04, due and owing as aforesaid from said firm to said defendant, neither said defendant nor any of its officers knew, or had any reasonable cause to believe, that said firm of T. Mitchell & Co.,

or any of its members, was insolvent, and that at said time neither this defendant, nor any of its officers, knew, or had any reasonable cause to know or believe, that the setting off of the said amount on deposit as aforesaid, to the credit of T. Mitchell & Co., against the indebtedness of said firm of T. Mitchell & Co. to this defendant would effect a preference, whereby this defendant would receive a larger percentage of the indebtedness due it from the said firm of T. Mitchell & Co. than the other creditors of said firm, of the same class, or any other class, would receive, and the said set-off was made as aforesaid, of said deposit against said indebtedness, without any purpose of securing such preference, or any other preference over and above any other creditor of said firm of T. Mitchell & Co (Tr. pp. 14-15).

Reply:

Par. 2. Denies each and every allegation contained in paragraph VI of said further, separate and affirmative defense, and the whole thereof.

Upon the issues so framed the case went to trial before a jury on the 30th of October, 1915, and over the objection of defendant, plaintiff introduced in evidence all the papers in connection with said bankruptcy matter hereinbefore particularly set forth and described, save and except that defendant made no objection to the introduction in evidence of the petition of the creditors of T. Mitchell & Co. to have said firm adjudged bankrupt.

At the close of plaintiff's case defendant moved for a directed verdict in favor of defendant, or in the event said directed verdict was not given, moved

the court for a nonsuit as against plaintiff (Tr. pp. 106-107), which motions were denied (Tr. p. 107), and exception taken (Exc. 32).

After all the evidence for plaintiff and defendant had been introduced in the case in chief, in defense, and in rebuttal, the defendant renewed its motion for a directed verdict and requested the Court to order the jury to bring in a verdict in favor of the defendant (Tr. pp. 172-173), which said motion was denied (Tr. p. 173), and exception noted by defendant (Exc. 42).

Thereafter the cause was argued by the attorneys for the respective parties, and the jury was instructed by the Court (Tr. pp. 173-183). The defendant presented to the Court certain instructions which it requested the Court to give to the jury, being Proposed Instructions A to I inclusive (found in Transcript on pages 183-188, inclusive), but the Court refused to give said instructions (Tr. p. 188), and to said refusal the defendant excepted (Exc. 43).

Prior to the retirement of the jury, and in the manner prescribed by law, the defendant objected and excepted to certain instructions, numbered 10 to 13, given by the Court (Tr. p. 188), which objections and exceptions were overruled (Tr. p. 189), and an exception duly noted by defendant (Exc. 44). Said defendant likewise, at said time and place, excepted to the Court's eliminating from certain instructions offered by defendant certain parts thereof, as shown by paragraphs C and D

(Tr. p. 189), which exceptions were duly allowed by the Court (Tr. p. 189, Exc. 45).

Before the retirement of the jury to consider its verdict, and within the time prescribed by law, defendant requested the Court to propound five certain special interrogatories to the jury, and the Court, in compliance with said request, submitted said interrogatories to the jury to be by them answered at the same time their verdict was rendered, the Court instructing them that said interrogatories were to be answered either "yes" or "no" (Tr. p. 183). The jury thereupon retired, and after some deliberation returned into Court, stating that they were unable to agree upon answers to all the questions so propounded, and the Court then called the attorneys to the bench and there announced that it was his understanding that the jury might answer such of the questions as they might mutually agree on and leave unanswered such as they could not so agree on (Tr. p. 193). The attorneys for defendant did not waive or relinquish their right to object to the entry of a judgment based upon said imperfect verdict, nor to except and object to a general verdict based upon the inconsistent special findings, nor did they waive any of the rights that might accrue to defendant by reason of the disagreement of the jury in respect to the answer to any question so propounded. The Court thereupon, instructed the jury orally upon the question of their inability mutually to agree upon answers to such special interrogatories and

authorized them to answer any of the interrogatories in other manner than by "yes" or "no", or to leave entirely unanswered such of the questions propounded as they might not mutually agree upon, and to return their general and special verdicts into Court (Tr. pp. 193-194). Thereafter, being interrogated by the foreman of said jury on the specific point as to whether or not the jury might leave unanswered certain of the interrogatories, the Court, to a certain extent, modified the first oral instruction, and informed the jury that, if "yes" or "no" would not form a sufficient answer to any of said interrogatories, they might answer such interrogatory in any manner on which they might mutually agree (Tr. p. 194). The jury again retired and shortly thereafter returned their general verdict against the defendant (Tr. p. 190), and returned their special verdict with three questions answered and two unanswered (Tr. p. 191). The *two* questions so left *unanswered* were the *two* questions which defendant contends were the *most vital* of the five, and without a unanimous verdict thereon there was no basis for a general verdict in favor of the plaintiff, for without answering both questions in the negative there could be no judgment against the defendant.

Thereafter the defendant moved for judgment notwithstanding the verdict (Tr. pp. 195-197), which motion was denied (Tr. p. 197), and an exception noted (Exc. 46).

Defendant filed a motion for a new trial within the time allowed by law (Tr. pp. 197-203), which motion, after argument, was overruled (Tr. p. 203), and exception noted (Exc. 47).

Defendant then filed objections to the entry of any judgment on the general verdict (Tr. pp. 203-204), which objections were overruled (Tr. p. 204), and exception noted (Exc. 48).

Before argument for judgment notwithstanding the verdict, the defendant asked leave of the Court *to amend* paragraph 1 of its answer by changing the words "August 1, 1913," to "July 31, 1913," to conform to the proof offered in said cause, and likewise to amend paragraphs 4 and 5 of its affirmative answer by making similar changes for the same reason, which motion the Court overruled (Tr. pp. 204-205), to which ruling defendant excepted (Exc. 49). The amended complaint states *date* was July 31st and *not* August 1st (Tr. p. 5).

Subsequent to the overruling of the defendant's objection to the entry of any judgment on the alleged general verdict, plaintiff submitted to the Court for signature a form of judgment from which were omitted, in the recitals of the verdict rendered, the two special interrogatories that the jury failed to answer; to the signing of which judgment defendant objected (Tr. p. 211), and the Court overruled said objection, to which ruling defendant excepted (Tr. p. 212, Exc. 50). The Court thereupon signed said judgment as presented,

without causing to be set forth therein the two questions upon which the jury disagreed and which they failed to answer (Tr. pp. 207-211), to which action on the part of the Court defendant excepted (Exc. 51). All of which is shown by the supplemental bill of exceptions (Tr. pp. 211-214).

The case is brought to this Court upon a writ of error.

Argument.

I.

AMENDED COMPLAINT DOES NOT STATE CAUSE OF ACTION.

The amended complaint expressly alleges that within four months prior to the order of adjudication that the copartnership of T. Mitchell & Co. “*delivered into the possession of the bank gold dust of the value of \$3750.27*” (Tr. pp. 5, 6, par. IV), “*with the intention on the part of T. Mitchell & Co. of selling the same to the bank and depositing the proceeds of such sale to their credit in their general deposit account in said bank, having the same credited to their deposit account for the purpose of checking against the same to pay wages of workmen*”, etc. and “*the Bank applied the whole value towards the payment of indebtedness then past due and owing from T. Mitchell & Co. to the bank, and immediately after ascertaining the value of said gold dust notified T. Mitchell & Co. that it had applied the whole value of said gold dust toward the payment of their past indebtedness and that the*

bank would not honor any checks against said amount; and T. Mitchell & Co. were not permitted to check against the same, and that said value was *not placed* to the deposit account in the bank *so as to entitle* T. Mitchell & Co. *to check against the same*" (Tr. pp. 6 and 7, par. VII); "that *at the time* of the delivery of the gold dust to the bank, T. Mitchell & Co. *were indebted to the bank* in a greater sum than \$3750.27, to wit: in the sum of \$4096.04, which indebtedness was past due" (Tr. p. 6, par. V); that at the time of the delivery of the gold dust, T. Mitchell & Co. were indebted to different persons in an aggregate sum exceeding the value of the estate of said firm and were insolvent, and the bank knew that T. Mitchell & Co. were insolvent or had reasonable cause to believe they were insolvent, and knew at the time of receiving the gold dust and at the time of applying the value thereof to the payment of the indebtedness then due, the bank would and did effect a preference whereby the bank would receive a larger percentage of the indebtedness due the bank from T. Mitchell & Co. than the other creditors, and the bank had reasonable cause to believe that the application of the value of said gold dust would effect a preference and the same was so applied by the bank with the purpose of procuring such preference" (Tr. pp. 7 and 8, par. VIII).

There is *no* allegation that the gold dust was delivered by Mitchell & Co. *as payment* of their *indebtedness or to be applied on account of their*

indebtedness, *nor* is it alleged that the bank *received* the gold dust *to be* so applied or with any *intention* or for the *purpose* of applying the value thereof to their indebtedness, or to effect or secure to the bank a preference or a greater percentage than any other creditor of the same class; but on the contrary, it is *expressly alleged* that the *intention* of Mitchell & Co. in delivering the gold dust to the bank *was to deposit* its value *to the credit of* Mitchell & Co. *in their general deposit account* in the bank, to be credited to their deposit account *for the purpose of checking* against the same “*to pay wages of workmen then working as well as to pay the running expenses of the mining operations then conducted by Mitchell & Co.* (Tr. pp. 6 and 7, par. VII).

The allegation is then made that the bank *applied* the whole value to the past indebtedness of Mitchell & Co. and so *notified* Mitchell & Co. and that the bank would not honor any checks of Mitchell & Co. against that value; that the bank also notified Mitchell & Co. that they would not be permitted to check against the same, and that it was not *so placed* to the deposit account of Mitchell & Co. *so as to entitle* them *to check* against the same (Tr. pp. 6 and 7, par. VII).

There is in the amended complaint absolutely *no allegation of fraud or collusion* on the part of Mitchell & Co. or on the part of the bank; the value of the gold dust was neither paid by Mitchell & Co.

on account of their indebtedness to the bank nor was it received by the bank as a payment.

Therefore, the legal effect of the allegations of the amended complaint is, that Mitchell & Co. owed the bank \$4096.04; that they had a general deposit account in the bank, and that they sold the bank gold dust of the value of \$3750.27 to be deposited to their credit in their general deposit account and to have the same credited to their general deposit account so that they could check against such account to pay their mining expenses, etc.

The allegations that the bank then knew they were insolvent and that to offset it against their indebtedness would give the bank a preference and a greater percentage than any other creditor of the same class, do not change or affect the legal result.

Immediately upon such deposit being made by Mitchell & Co. the relation of *debtor and creditor* arose between them and the bank as to the value of this gold dust; the *estate* of Mitchell & Co. *was not thereby diminished* and mutual debts and credits between the bank and Mitchell & Co. existed, and the bank had the legal right at any time thereafter to *offset* this value against the past due indebtedness of Mitchell & Co., and if the bank had not done so *the law would automatically do so* for the bank, and the Court and the Trustee would have done so in the bankruptcy proceeding in ascertaining what the amount of the bank's claim against the bankrupt's estate was, under section 68-a of the Bankruptcy Act.

The defendant asked the Court for a *directed verdict* in favor of defendant (Tr. pp. 172-173), and also moved for judgment notwithstanding the verdict, especially embracing therein that the amended complaint failed to state a cause of action (Tr. pp. 195-196; (3) and (4), p. 196;

U. S. v. Gardener, (9th Circuit), 133 Fed. 285.

The Bankruptcy Act, section 68-a, declares:

“In all cases of *mutual debts and credits* between the estate of a bankrupt and a creditor the account shall be stated and *one debt shall be set off against the other*, and the *balance only* shall be allowed or paid.”

4 Comp. Stat. 1916, sec. 9652.

In *New York County Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, it was held that, even though the bank knew at the time certain deposits were made by its customer that his liabilities greatly exceeded his assets, the bank, under the Federal Bankruptcy Act, was not required to surrender to the trustee in bankruptcy the deposits as a condition precedent to proving the balance of its claim, but it had the right to appropriate the deposit to the payment of the indebtedness of the customer of the bank. It was there said:

“As we have seen, a deposit of money to one’s credit in the bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the

amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift or security. It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to setoff. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent setoff in cases coming within the terms of section 68-a. If this argument were to prevail, it would in cases of insolvency defeat the right of setoff recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to

Further in the same opinion it is stated:

"It is true, as we have seen, that in a sense the bank is permitted to obtain a greater percentage of its claim against the bankrupt than other creditors of the same class, but this indirect result is not brought about by the transfer of property within the meaning of the law. There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

In *Studley v. Boylston*, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, under facts similar to those in the *Massey* case, and following that case, it was held

that the bank itself had the right to make the appropriation and prove its claim for the balance. It was there stated:

“If this setoff of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the trustee. But there is nothing in paragraph 68-a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted.”

In *Germania Savings Bank & Trust Co. v. Loeb*, 188 Fed. 285-288, 110 C. C. A. 263, 266, the Circuit Court of Appeals for the Sixth Circuit stated the doctrine of the *Massey* case as follows:

“It has been authoritatively decided by the Supreme Court, in considering these two sections, that the balance of a regular bank account at the time of filing the petition is a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the bank and the bankrupt, with the view of creating a preferential transfer, the bank need not surrender such balance, but may set it off against notes of the bankrupt held by it, and may prove its claim for the amount remaining due on the notes.”

Where the account between the bankrupt's estate and the person or corporation charged with having received a preference is an account current, the balance of the account, when the transactions cease, is to be taken in determining whether there has been an advancement by the bankrupt's estate which

would constitute a voidable preference. If the bankrupt's estate has not been diminished by reason of the transactions, there is no voidable preference.

C. S. Morey Mercantile Co. v. Schiffer, 114 Fed. 447, 52 C. C. A. 249;

Dickson v. Wyman, 111 Fed. 726, 49 C. C. A. 574, 55 L. R. A. 349;

Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717.

In the last case cited, speaking upon this question, it was said:

“The account was a running account, and the effect of the payments was to keep it alive by the extension of new credits, with the net result of a gain to the estate of \$546.89, and a loss to the seller of that amount less such dividends as the estate might pay.”

To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be: First, a parting with the bankrupt's property for the benefit of the creditor; and, second, diminution of the bankrupt's estate. In *Continental Trust Co. v. Chicago Title Co.*, 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268, it was said:

“This case must be dealt with in the light of certain principles established by decisions of this court in determining the applicable provisions of the Bankruptcy Act. To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent *diminution* of the bankrupt's estate.”

It is well settled as a general proposition that a bank has the right to set off any indebtedness it may hold against the bankrupt against a general deposit standing to the credit of such bankrupt. This is expressly allowed by section 68 of the Bankruptcy Act. See Collier on Bankruptcy (10th Ed.) p. 976 et seq. Whether the bank charges off the deposit of its customer and applies it on the indebtedness which it holds against the customer, or whether it draws a check in the name of the customer covering his deposit and applies it as a credit on the indebtedness, or whether it does neither of these things, but appeals to the law to do the same thing in effect, makes no difference as a legal proposition. *Toof v. City National Bank* (C. C. A. 6th Circuit), 30 Am. Bankr. Rep. 79, 206 Fed. 250, 124 C. C. A. 118; *Studley v. Boylston National Bank* (U. S. Sup. Ct.) 30 Am. Bankr. Rep. 161, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313; *Continental etc. Savings Bank v. Chicago Title & Trust Co.*, 30 Am. Bankr. Rep. 624, 229 U. S. 435, 33 Sup. Ct. 829, 57 L. Ed. 1268; *Chisholm v. First National Bank* (Ill. Sup. Ct.) 35 Am. Bankr. Rep. 598, 269 Ill. 110, 109 N. E. 657; *New York County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380; *Lowell v. International Trust Co.* (C. C. A. 1st Circuit) 158 Fed. 781, 86 C. C. A. 137, 19 Am. Bankr. Rep. 853; *In re Radley Steel Construction Co.* (D. C.) 212 Fed. 462, 32 Am. Bankr. Rep. 514.

Considering the question relative to the subsequent advancements, the rule of the federal courts

is that a security transferred for future advances, in the absence of fraud or collusion, does not constitute a voidable preference.

Tomlinson v. Bank of Lexington, 145 Fed. 824; 76 C. C. A. 400;

Van Iderstine v. National Discount Co., 227 U. S. 575; 33 Sup. Ct. 343; 57 L. Ed. 652.

The doctrine in these two cases may be stated by quoting a paragraph from the syllabus of the Tomlinson case, as follows:

“Where a bank allowed a customer to overdraw on the express agreement that the customer should assign good accounts for collection to pay the overdraft, the subsequent assignment of the accounts, although the customer was insolvent, did not constitute the giving of a preference.”

In Putnam v. U. S. Trust Co. (Sup. Ct. Mass. March, 1916), 36 Am. Bankr. Rep. 658, 664, the Court, where a *payment* was made, and referring to section 68-b, Bankruptcy Act, said:

“This section requires as a condition for recovery by the trustee in bankruptcy against the creditor, *three* distinct facts: The bankruptcy, that the transaction then effected a preference, and that the creditor had reasonable cause to *believe* that a preference was being effected. The only serious contention which can be made in this connection is respecting the last factor, whether the defendant at the time of receiving these three payments of \$500 each, had ‘reasonable cause to *believe*’ that these payments would effect a preference.

“The governing principles of law upon this point are in substance that reasonable cause to *believe* is *not* the equivalent of reasonable cause to *suspect*. The two ‘phrases are distinct in meaning and effect’. It is not enough that a creditor has some cause *to suspect* the insolvency of his debtor, but he must have such a *knowledge of facts* as to induce a reasonable belief of his debtor’s *insolvency*, in order to *invalidate* a security taken for his debt. To make mere *suspicion* a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have *many grounds of suspicion* that his debtor is in *failing* circumstances, and yet have *no cause* for a well grounded *belief* of the fact. He may be *unwilling to trust* him further; he may *feel anxious* about his claim, and have a strong desire to secure it—and yet *such belief* as the act requires may be *wanting*. Obtaining additional security, or receiving *payment* of a debt *under such* circumstances is *not prohibited by law*. Grant v. Nat. Bk., 97 U. S. 80, 81; Stucky v. Masonic Sav. Bk., 108 U. S. 74; In re Chicago Car Co., 211 Fed. 628; *Rosenman v. Coppard*, 228 Fed. 114.”

In *Am. Bk. & T. Co. v. Coppard*, 227 Fed. 597, 35 Am. Bankr. Rep. 742, the Circuit Court of Appeals, Fifth Circuit, said:

“The question presented is of great importance to the business of banking, upon which the prosperity of the country so largely depends. It is true, that if an insolvent, within four months antecedent to bankruptcy, should make deposits or give checks to a bank to enable it to secure a preference, the transaction would be inimical to the bankruptcy law, and would be held void as a preference.

“But, when an insolvent customer makes a deposit with his bank, in good faith, and in the usual course of business, at any time within four months before the petition in bankruptcy is filed against him, the bank is allowed to credit the amount on notes of the bankrupt held by it. *New York County N. Bk. v. Massey*, 192 U. S. 138, 48 L. Ed. 380, 11 Am. Bankr. Rep. 42.

“A case more nearly in point, however, is that of *Studley v. Boylston Nat. Bk.*, 229 U. S. 527, 57 L. Ed. 1313, 30 Am. Bankr. Rep. 161. There the Court restricted its attention to the bank’s right of *setoff*, under section 68-a and 68-b of the Bankruptcy Act, * * *. This controlling precedent is additionally important because there the setoff was made by checks drawn by the bankrupt against his account in the bank, and credited on past due indebtedness, as in the case at bar * * *.

“We deem this conclusion of the Supreme Court, salutary and sound. An honest man of business, though embarrassed and possibly insolvent, may not be deprived of the great aid of legitimate banking. Though in deep water, one is not forbidden to swim to safety if he can. Since there is nothing in the record betraying any evidence of fraud, or evasion of the bankruptcy law, on the part of the bankrupt or the bank, we must hold that the latter was entitled to the instruction it sought.”

The allegations of the complaint that the partnership *sold and delivered* the gold dust to the bank, the *value* thereof to be credited to the partnership in their account with the bank, *resulted* immediately in the creation of *mutual debts and credits* between the partnership and the bank, and these mutual debts and credits, even if not *offset* by the

bank, must be offset by authority of the law, section 68-a of the Bankruptcy Act, and the *balance* only, that act says, shall be allowed or paid.

So that, however these allegations are viewed, they show conclusively, that *without fraud or collusion* on the part of the partnership or the bank, the partnership owed and was indebted to the bank, in the sum of \$4,096.04, and on the sale and delivery of this gold dust to the bank, the bank became indebted to the partnership for its value; there therefore existed mutual debts and credits, which section 68-a of the Bankruptcy Act says must be *offset* against each other, *either* by the bank, or by the law automatically, or by the Court whenever and wherever called upon to declare what is the amount of *the debt* between the partnership and the bank.

II.

PLAINTIFF IN THE CASE AT BAR HAD NO AUTHORITY TO INSTITUTE THIS ACTION TO RECOVER PROPERTY OF THE FIRM OF "T. MITCHELL & CO." AS HE HAD NEVER FILED ANY BOND OR UNDERTAKING, AS PRESCRIBED BY THE BANKRUPTCY ACT, AS TRUSTEE FOR THE ESTATE OF THE COPARTNERSHIP OF T. MITCHELL & CO., AND NO APPLICATION WAS MADE EITHER BEFORE OR DURING SAID TRIAL OR SUBSEQUENT THERETO, ASKING PERMISSION TO FILE SUCH AN UNDERTAKING. THE ONLY BOND GIVEN WAS AS TRUSTEE OF THOMAS MITCHELL, JAMES J. FALLON AND HERMAN FAWCETT (Tr. p. 47).

One of the essential prerequisites to the right of a trustee to administer the estate of a bankrupt

is the execution of a bond to the United States in such sum as may be fixed by the creditors. Subdivision B of section 50 of the Bankruptcy Act provides as follows:

“Trustees, before entering on the performance of their official duties, and within ten days after their appointment, or within such further time, not exceeding five days, as the Court may direct, shall respectively qualify by entering into a bond to the United States, with such sureties as shall be approved by the Courts, conditioned for the faithful performance of their official duties.”

Subdivision C of section 50 of said act provides for the creditors fixing the amount of the bond, or in the event of their failure so to do, that said amount shall be fixed by the Court. The Court will observe, by an examination of plaintiff's exhibit G-1 (Tr. pp. 47-48), that no attempt was made by the plaintiff in the case at bar to qualify as prescribed by law. The instrument is headed “In the matter of T. Mitchell & Co., bankrupt”. G. F. Johnson and two sureties then bind themselves unto the United States in the sum of one thousand dollars. The condition recited in the bond is in part as follows:

“The condition of this obligation is such that, Whereas the above named G. F. Johnson was, on the 16th day of October, A. D. 1913, appointed trustee in the case pending in bankruptcy in said Court *wherein Thomas Mitchell, James J. Fallon, and Herman Fawcett are the bankrupts*, and he, the said G. F. Johnson, has accepted said trust and all the duties and obligations pertaining thereto,

Now, therefore, if the said G. F. Johnson, *trustee as aforesaid*, shall obey such orders as said Court may make, *in relation to said trust*, and shall faithfully and truly account for all the moneys, assets and effects of the estate *of said bankrupts* which shall come into his hands and possession, and shall in all respects faithfully perform all his official duties as such trustee, then this obligation to be void; otherwise to remain in full force and virtue."

No mention is made in said purported bond, elsewhere than in the caption thereof, which is not referred to in the body of the instrument, of the firm of T. Mitchell & Co., and the only reference to any obligation on the part of said trustee under said bond is to administer the estate of the three individuals named therein, to wit, Fallon, Mitchell, and Fawcett. The question naturally presents itself as to what would be the liability of the bondsmen under said bond should property of T. Mitchell & Co., a copartnership, come into the possession of the trustee and be by him converted to his own use. The firm of T. Mitchell & Co. has never been adjudicated bankrupt. The trustee, plaintiff in this action, the principal obligor under said bond, was never appointed as trustee of the estate of T. Mitchell & Co., and the said bond does not purport to be anything other than a bond guaranteeing his faithful administration of the assets of Fallon, Mitchell, and Fawcett. By what theory could the sureties under said bond be held liable for any default on the part of said Johnson in the administration of any of the property

belonging to the firm of T. Mitchell & Co., a copartnership? As the giving of a bond is an absolute prerequisite to the right of a trustee to administer an estate, and as no such bond was given in the estate of T. Mitchell & Co., the plaintiff in the case at bar has never qualified as administrator of the estate of T. Mitchell & Co. and consequently has no authority to institute an action to recover property claimed to be the property of said copartnership. The above bond was the bond *approved* by the referee in bankruptcy; that bond is a bond as trustee of the *individual* partners' estates and *not* of the *partnership* of "T. Mitchell & Co." Under the Bankruptcy Act, section 21d, a certified copy of the *order approving* the bond vests title in the trustee; and therefore, title to the *partnership* property of "T. Mitchell & Co." *never vested in* this trustee, and the trustee cannot maintain this suit to recover *partnership* property.

We are aware that there are some decisions that hold that where the question of a trustee's failure to give a bond is raised in a State Court the presumption is that the trustee duly qualified by complying with the provisions of the statute relating to the bond, but that rule is not applicable in the case at bar, for that is one of the issues presented in the case, and plaintiff attempted to prove the fact and introduced in evidence the only bond given by the said trustee, which shows on its face that it is *not* a bond in the case of *T. Mitchell & Co.*

Section 50 of the Bankruptcy Act provides:

“If any referee or *trustee shall fail to give a bond as herein provided* and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.”

Counsel respectfully submit that no bond was ever given, or attempted to be given, in the partnership estate, and that, even if the partnership had been adjudged bankrupt, which it was not, plaintiff in the case at bar would have no authority to institute or prosecute said action.

Exception 5, Tr. pp. 43-44.

Failure to give a bond creates a vacancy.

Bankruptcy Act, Sec. 60-b.

III.

THE COPARTNERSHIP OF T. MITCHELL & CO. WAS NEVER ADJUDGED BANKRUPT BY THE COURT AND THE COURT ERRED IN ADMITTING IN EVIDENCE THE ALLEGED ADJUDICATION IN BANKRUPTCY, PLAINTIFF'S EXHIBIT D (Tr. pp. 39-40, Exc. 4).

The Court will observe, from the reading of said alleged adjudication, that the adjudication is confined to “Thomas Mitchell, James J. Fallon, and Herman Fawcett, copartners under the firm name of T. Mitchell & Co.”, and the actual words of adjudication are as follows:

“The said Thomas Mitchell, James J. Fallon, and Herman Fawcett, copartners doing business under the firm name and style of T.

Mitchell & Co., are hereby declared and adjudged bankrupt accordingly;”

that is, the *individuals* composing the firm. There is no adjudication of the copartnership of “T. Mitchell & Co.” as a bankrupt. The order of reference, plaintiff’s exhibit F (Tr. pp. 41-42) recites:

“Whereas Thomas Mitchell, James J. Fallon, and Herman Fawcett, copartners under the firm name and style of T. Mitchell & Co., of the Fairbanks Precinct, Fourth Division, Territory of Alaska, on the 30th day of September, 1913, were duly adjudged bankrupt,” etc.,

and the order further recites:

“Ordered that said matter be referred to W. H. Adams, referee in bankruptcy of this Court, to take such further proceedings therein as are required by said acts, and that said Thomas Mitchell, James J. Fallon, and Herman Fawcett shall attend before said referee on the 16th day of October, 1913,” etc.

The bond given by the trustee (Tr. pp. 47-48) recites as follows:

“Whereas the above named G. F. Johnson was, on the 16th day of October, A. D. 1913, appointed trustee in the case pending in bankruptcy in said Court, wherein Thomas Mitchell, James J. Fallon, and Herman Fawcett are the bankrupts.”

At no place is there an adjudication that the firm of T. Mitchell & Co. was bankrupt, and without such adjudication the trustee in bankruptcy

would have no jurisdiction to administer the estate of T. Mitchell & Co. or any portion thereof.

Volume 3 Ruling Case Law, sec. 48, p. 213, holds:

“The uniform current of authority is that the adjudication of a partnership a bankrupt, apart from, or in addition to, the adjudication of its partners bankrupt, is indispensable to the jurisdiction of a court of bankruptcy to administer the partnership property;” citing *In re Berthenshaw*, 157 Fed. 363, 85 C. C. A. 61, 13 Ann. Cases 986, 17 L. R. A. (N. S.) 886.

In treating of this subject, Collier on Bankruptcy, 9th Ed., pp. 146-47, says:

“But a partnership now is something other than that under the law of 1867. There the words were, ‘two or more persons who are partners in trade.’ Now it is ‘a partnership’ that ‘may be adjudged a bankrupt.’ This phrasing, coupled with other clauses, has led to the doctrine that a partnership is in bankruptcy a legal entity—a joint relation where the identity of the members has been lost—and that, therefore, the individuals and the partnership are entities separate and distinct from each other. A partnership being a distinct entity, it owns its property and owes its debts apart from the individual property of its members which it does not own, and apart from the individual debts of its members which it does not owe. It may be adjudged bankrupt, although the partners who compose it are not so adjudicated. In other words, the firm must petition or be petitioned against; if the latter, the firm, or a member of it acting within the scope of the partnership, must have committed the act of bankruptcy; and, if adjudication follows, *the firm, or nomine, must be adjudicated*. Under this principle a partner-

ship as an entity may be adjudged to be a bankrupt, irrespective of any adjudication against the individual members."

In Loveland on Bankruptcy, vol. 1, p. 549, the learned author says:

"Where a partnership is not adjudged a bankrupt, the partnership property is not drawn into bankruptcy for administration, but only the individual assets of the partners adjudicated bankrupt. Where the Court obtains jurisdiction of one of the partners, it has power to adjudicate the firm and all of the partners bankrupt and to administer the partnership and individual property. *If, however, the Court does not adjudicate the firm bankrupt, the firm property is not drawn into bankruptcy.*"

This question has been passed upon a number of times by the various Circuit Courts, and the case of *In re Mercur* in the Third Circuit, 122 Federal 384, is directly in point. In that case the Court holds as follows:

"Where all the members of a firm are adjudicated bankrupts, but there has been no adjudication against the firm, the trustee appointed in the individual cases has no authority to interfere with firm assets, though all the cases were instituted simultaneously by the same creditor and the same trustee appointed for all the partners. In the contemplation of the bankruptcy act of 1908 the partnership is a distinct entity, which requires a petition specifically directed against it, alleging an act of bankruptcy in which it is expressly involved, and resulting in an adjudication against the partnership itself, irrespective of and in addition to any that may be made against the indi-

vidual members; and simultaneous proceedings against the individual members of a partnership do not necessarily bring the partnership into Court so as to authorize an amendment calling for an adjudication against it."

In that case the contention was that, as the individual partners had been adjudged bankrupts, and amendment should be allowed to bring the partnership property into Court, but the Court ruled as above set forth and cited a great number of authorities as found in 122 Fed. 389.

In the case of *Mills v. J. H. Fisher & Co.*, from the Sixth Circuit, decided in 1908, 159 Fed. 898, the Court says:

"So distinct are the assets of the members of the firm from that of the firm that when all the members of the firm are adjudged bankrupt individually and the firm is not so adjudged, the trustee of the individual members was adjudged not to be entitled to administer firm assets which were in the hands of a trustee under an assignment made by the firm. *Am-sinck v. Bean*, 22 Wall. 395, 22 L. Ed. 801; *In re Mercur*, 122 Fed. 384."

The Circuit Court for the Eighth Circuit, in *In re Berthenshaw*, 157 Fed. 363, on page 371, says:

"The uniform current of authority is that under this act (act of 1898) a partnership is a distinct entity separate from the individuals who compose it, that it owns its property and owes its debts, which are respectively separate and distinct from the individual property and the individual debts of its partners, and that an adjudication of the partnership a bankrupt apart from, or in addition to, the adjudication

of its partner's bankrupts, *is indispensable to the jurisdiction of a court of bankruptcy to administer the partnership property.* In re Mercur, 122 Fed. 384, 388, 58 C. C. A. 472, 476; In re Stein & Co., 11 Am. Bankr. Rep. 536, 538, 127 Fed. 547, 62 C. C. A. 272; In re Corcoran, 12 Am. Bankr. Rep. 283, 287; In re Sanderlin (D. C.) 109 Fed. 857-859; In re Meyers, 98 Fed. 976, 979, 39 C. C. A. 368, 371; Strause v. Hooper (D. C.) 105 Fed. 590; In re Farley (D. C.) 115 Fed. 359, 361; In re Meyers (D. C.) 96 Fed. 408, Id., 97 Fed. 757; In re Russell (D. C.) 97 Fed. 32; Green River Deposit Bank v. Craig (D. C.) 110 Fed. 137; In re McFaun (D. C.) 96 Fed. 592; In re Barden (D. C.) 101 Fed. 553; In re Hale (D. C.) 107 Fed. 432."

So far as counsel's investigations disclose, the doctrine enunciated in the cases cited above has never been overruled or modified. We are aware that the United States Supreme Court, in the case of Francis v. McNeil, 228 U. S. 695; 57 L. Ed. 1029, in discussing the Berthenshaw case, on the question of whether or not the property of the individual members of the copartnership is brought into Court to be administered when the copartnership itself is adjudged bankrupt, does not follow the rule on that subject laid down in the Berthenshaw case, but approves the ruling made in the case of Boccaro v. Security Bank, 43 C. C. A. 279; 103 Fed. 436-442. But the point there involved was entirely separate and distinct from the point involved in the case at bar, and they were considering a separate subdivision of section 5 of the Bankruptcy Act. The Supreme Court there held

that the entity theory did not extend to the proposition that there could be any insolvency of the copartnership without an insolvency of the individual members composing it, but did not criticize any of the Circuit Courts of Appeal holding that it was absolutely necessary to have adjudication of the copartnership itself before the property of the copartnership could be administered by the trustee appointed for the individual members of the partnership.

As the copartnership of Mitchell & Co. was not adjudged bankrupt, a trustee appointed as trustee of the assets of the individual members of said copartnership would have no jurisdiction over the property of the firm of Mitchell & Co., and in the case at bar would have no authority to institute this action based upon the adjudication in bankruptcy of the individual members only, and the Court erred in admitting in evidence the alleged order of adjudication.

The foregoing argument is applicable to the exceptions taken by the defendant to the admission in evidence of plaintiff's exhibit F, being the alleged order of reference (Tr. pp. 41-42, Exc. 5), as said order is entirely in reference to the individual assets of the three members of the copartnership; also to the admission of plaintiff's exhibit G (Tr. pp. 45-46), which was the appointment of the trustee by the referee, wherein the referee attempts to appoint a trustee in the estate of T. Mitchell & Co., bankrupts, when they had not been adjudged

bankrupts; to the acceptance by the trustee of said alleged appointment (Tr. p. 45), which is also entitled "In the matter of T. Mitchell & Co., bankrupts"; to plaintiff's exhibit G-1 (Tr. pp. 47-49), which is a bond given by said trustee; and to the order approving said bond (Tr. p. 46); all of which is covered by defendant's exceptions Nos. 5, 6, and 7 (Tr. pp. 43-44).

No evidence having been introduced by the plaintiff showing that the *copartnership* of T. Mitchell & Co. had ever been adjudged bankrupt, nor that the trustee had given bond as trustee of the *partnership*, and the plaintiff in the action at bar had no right to prosecute said action and defendant's motion for nonsuit at the close of plaintiff's case should have been granted (Tr. pp. 106-107, Exc. 32).

As heretofore shown, an attempt was made to appoint the plaintiff in the case at bar trustee of the estate of T. Mitchell & Co. and of the individual members composing said firm, but as the *copartnership* had never been adjudged bankrupt said trustee would have no authority or jurisdiction to administer said estate, and plaintiff utterly failed to prove the essential allegations of his amended complaint, as found in paragraphs 1 and 2 thereof (Tr. pp. 4 and 5).

IV.

THE CASE ON THE MERITS.

On the *merits* of the case at bar the position of the plaintiff in error is briefly as follows:

(I) That when T. Mitchell & Co., in the afternoon of the 31st of July, 1913, sold and delivered to the American Bank of Alaska gold dust of the value of \$3750.27,

(a) That said delivery was made in the due course of business;

(b) That said gold dust was sold to said bank;

(c) That the value thereof was immediately ascertained and credited to the general account of T. Mitchell & Co. on the records and books of the bank, and in their pass book, and offset against their indebtedness to the bank;

(d) That the title to said gold dust became vested in said bank as soon as it was delivered to the bank;

(e) That when the value thereof was credited to T. Mitchell & Co. on the records and books of the bank, and in their pass book, it became an ordinary commercial deposit;

(f) That such deposit when so credited automatically extinguished the overdraft; though in fact it was credited and offset against their indebtedness;

(g) That the bank had the absolute right then and at any time thereafter to charge against said

account the overdue notes of T. Mitchell & Co. then in the possession of said bank;

(h) That had the bank not made this charge of that overdue paper against said account, the trustee would have been compelled to make it under section 68-a of the Bankruptcy Act had said T. Mitchell & Co. afterwards become bankrupt;

(i) That no preference was created, as said term is used in the National Bankruptcy Act.

(II) That the bank had no knowledge at the time of the receipt of said gold dust and the crediting of said account on the books of the bank and on the pass book of T. Mitchell & Co., that said firm was insolvent.

(III) That the bank did not then have reasonable cause to believe that, by receiving said deposit, and crediting it to their general account, it would work a preference in favor of said bank, as said term is used in Bankruptcy Act.

(IV) That the occurrences that precipitated the bankruptcy of T. Mitchell & Co. happened subsequent to the time of the receipt of said deposit by the bank.

(V) That the levying of a garnishment on the bank subsequent to the time of the making of said deposit and the charging of the notes and overdraft against said deposit account, in an action instituted by Rutherford and Widman without the knowledge or connivance of the bank, was only a contributory factor in precipitating the bankruptcy.

(VI) That the extinguishment of the overdraft and the charging of the overdue notes against said deposit did not, in itself, contribute even remotely to the failure of said T. Mitchell & Co.

We respectfully submit to the Court that, of all the propositions above set forth, the only ones essential to support the position of plaintiff in error were the establishment of the fact that the gold dust was received in the due course of business, the value thereof credited to the deposit account of T. Mitchell & Co., and the immediate charging against said account of the overdue paper of T. Mitchell & Co., then held by the bank; and if these facts were established, plaintiff in this action could not prevail.

We desire to call the Court's attention to the unique theory upon which the case of the defendant in error was predicated in the lower Court and the theory upon which the jury apparently based its verdict, to wit, that a "deposit" is not a deposit unless the depositor is permitted to check out the entire sum deposited; that an overdraft can not be extinguished until the depositor draws a check against his deposit, payable to the bank, and delivers said check to the bank to be credited against the overdraft; that an entry to the depositor's account on the credit side of the ledger does not in itself offset a debit entry in an equal, greater, or less amount, but that the bank is presumed to perform some other affirmative act,—the nature thereof being somewhat indefinite,—before such

setoff can occur. Applying this theory to the case at bar when the bank credited the proceeds of the sale of the gold dust to the account of T. Mitchell & Co., that it was not a "deposit", for the depositor was not permitted to check out the whole sum so credited; that as it was not a deposit it could not be set off against the indebtedness of T. Mitchell & Co.; that the bank did no other affirmative act and made no entry of a solemn declaration in its books that any setoff had taken place as against the overdraft, and that therefore the fund still remained intact and the indebtedness of T. Mitchell & Co. was not diminished in any amount; etc., *ad infinitum ad absurdum*. In the case at bar, the money was advanced by the bank and was used to pay the bankrupt's creditors part of their wages, to purchase the groceries consumed by them, and that they had already once received the value of the gold dust that they now claim the bank wrongfully converted. Fallon testified the bank paid \$3071 *labor checks* between July 16th and 31st (Tr. p. 67). Through the bank's allowing overdrafts and advancing money on notes and paying their checks therewith, they had already received in benefits the value of the gold dust extracted by them, long before it was actually taken from the ground. The bank furnished the means that enabled their employers to conduct mining operations, to give them employment at five dollars a day and board, and to purchase the necessary supplies to enable them to continue work.

They were on the ground and knew infinitely better than the bank whether or not the mining operations could be successful. The bank had no representative on the ground, nor was it supposed to have one. The bank received no benefits,—not even interest on such moneys as were loaned to the operators. It handled the third cleanup in no different manner from either of the other cleanups theretofore had. It had a promise of the operators to deliver the gold dust to the bank after each cleanup, and from the assurances given to the bank by the operators and their past experience as respects the first two cleanups, the bank felt safe in advancing more funds than the operators had on deposit. They trusted the operators in order to help them to get started at a time when they had no funds of their own, and would probably have continued to permit overdrafts had no suit been commenced against the operators, but when suits were instituted by other creditors good business methods forbade further advancements.

Wherein was the bank at fault? Was it in advancing money to pay the money and buy provisions for them before they had taken out the gold dust necessary to pay for them? If so, who but the laborers and merchants and other creditors now clamoring for this money received the benefit? Had the bank not permitted an overdraft, had it advanced no money on notes, and had the operators become bankrupt after the third cleanup, what would have been the tangible assets of the bank-

rupt firm? Obviously the value of the gold dust, and the bank had already advanced and the creditors had received the benefit of \$345.87 in excess of the value of the gold dust so extracted, and the crediting by the bank of the value of the gold dust on the overdraft and overdue notes did not diminish the estate of said bankrupts.

The *net result* of the bank deposits and credits allowed was *gain* to the bankrupts' estate, and *not* voidable preferences. This is the "*net result rule*", applied in bankruptcy matters, and sustained by the following cases:

Jaquith v. Alden, 189 U. S. 78;

Yaple v. Dahl-Millikan G. Co., 193 U. S. 526;

Wilde & Co. v. Provident L. & T. Co.,
214 U. S. 292.

There can be *no* preference where the bankrupts' estate is *not diminished*.

As shown below and from their own evidence and the admitted facts, they opened their account with a credit which the bank gave them on their note for \$200, were always overdrawn and closed owing the bank an overdraft of \$345.90; and if the credit and offset of the *third* cleanup, constituted a voidable preference, so also did the credit and offset of the *first and second* cleanups, because there was no difference in what was done each time and the course of dealing was always the same from first to last.

The deposit of the value of said gold dust, sold to the bank on the 31st of July, 1913, to the credit of T. Mitchell & Co. was not a transfer constituting a preference and did not diminish the estate.

“A deposit of money in a bank upon an open account subject to check is not a transfer constituting a preference, although the bank as a creditor has the right to set off its claim against the deposit.”

Collier on Bankruptcy, 9th Ed., p. 807, citing
In re Hill Co., 130 Fed. 315, 16 Am. Bankr.
Rep. 733.

“A deposit of money to one’s credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time on the part of the bank an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw check against it. It is not a transfer of property as a payment, pledge, mortgage, gift, or security.”

New York County Natl. Bank v. Massey,
192 U. S. 138.

When the bank purchased from T. Mitchell & Co. the gold dust in controversy the relation of debtor and creditor arose, and the bank had an absolute right to set off, as against the claim of T. Mitchell & Co., any indebtedness due from T. Mitchell & Co. to the bank.

In the case at bar T. Mitchell & Co. was, on the afternoon of the 31st of July, 1913, indebted to the bank for overdrafts in the sum of \$2246.14 (Tr. p. 166-b), and also owed to it one \$850 note,

another \$500 note, and another note the amount of which does not appear but which was in excess of \$150, making a total indebtedness to the American Bank of Alaska of a sum greater than the amount of the bank's indebtedness to T. Mitchell & Co., and thus, immediately on the consummation of the sale of said gold dust mutual debits and credits existed between the bank and the firm of T. Mitchell & Co., thus bringing the case squarely within the provisions of section 68-a of the National Bankruptcy Act, which is as follows:

“In all cases of *mutual debts or mutual credits* between the estate of a bankrupt and a creditor, the account shall be stated, and *one debt shall be set off against the other* and the *balance only* shall be allowed or paid.”

“A bank is entitled to set off certain demand notes of a bankrupt when an action is brought by the trustee to recover moneys on deposit.”

Collier on Bankruptcy, 9th Ed., p. 977, citing Steinhardt v. Natl. Park Bank, 19 Am. Bankr. Rep. 72, 120 N. Y. App. Div. 255; Irish v. Citizens' Trust Co., 21 Am. Bankr. Rep. 39, 163 Fed. 880.

The Court will notice a distinction that plaintiff in error has attempted to avoid in connection with the time of the setoff of the notes, that no adjudication of bankruptcy had been made of T. Mitchell & Co., or of any of the members of said firm, at the time of said setoff, and no petition was filed to have them adjudicated bankrupts until some weeks later. Over ten thousand dollars had been

spent by T. Mitchell & Co. in opening up the mining ground and the ground was looking better and they expected to continue work. Plaintiff in said action endeavored to secure some testimony from Mr. Fallon that he notified Mr. Bruning that he would have to shut down if he was not permitted to draw any more checks against the account (Tr. p. 171):

“Q. State when it was that you notified Mr. Bruning that if the checks of that firm would not be honored that you would have to shut down?

A. Well, Judge Pratt, *those words never came out of my mouth* in my testimony, *about me shutting down.*

Q. Some different words then?

A. *No sir.*”

It appears from the evidence that there was no thought in the minds of the members of the copartnership that they would have to shut down, and that they were merely chagrined that they could not continue to overdraw from the bank, and it was only later, when they found they could not obtain funds to carry on their work, that they acknowledged themselves bankrupt.

The deposit of the value of the gold dust delivered by T. Mitchell & Co. to the American Bank of Alaska was a “general deposit” in the due course of business.

The gold dust in controversy, the proceeds of the third cleanup, was delivered to the bank in the same manner as the first and second cleanups; was in a similar manner sold to the bank, and as

soon as the gold dust was thoroughly cleaned and weighed and computation made to ascertain the value thereof, based upon the market value of that particular gold dust, to wit, \$16.47 an ounce, the amount so ascertained, \$3750.41, was, before 6 p. m. on the 31st of July, 1913, credited in the pass book of T. Mitchell & Co.

A "general deposit" is defined in 3 Ruling Case Law 517 as follows:

"A general deposit is a deposit generally to the credit of the depositors, to be drawn upon by him in the usual course of the banking business. A special deposit is a deposit for safe keeping, to be returned intact on demand or for some specific purpose not contemplating a credit on general account,"

citing a number of authorities. No contention was made that this account was a special deposit and all the evidence shows that it was not treated, or expected to be treated, any differently than any other cleanup had been. The same authority, page 513, says:

"A deposit in a bank is presumed to be general in the absence of an agreement to the contrary. This is placed on the ground that such a deposit is esteemed the most advantageous to the depositor and most consistent with the general objects, uses, and course of business of banks."

A large number of illustrations in a great variety of cases on what constitutes a general deposit is set forth at 3 Ruling Case Law 518.

In the case of a general deposit of money in bank, the moment the money is deposited it becomes the

property of the bank and the bank assumes the legal relation of debtor and creditor.

This statement is taken from the text in section 149 on page 519 of 3 Ruling Case Law and is supported by a hundred or more ruling cases. The legal relation of debtor and creditor as regards the value of the gold dust in controversy, as between the bank and T. Mitchell & Co. was created upon the entry by the bank of the credit of \$3750.43 in the bank's records, before 6 p. m. on the 31st of July, 1913. All the evidence in the case at bar shows that the credit was entered in the bank records before 6 p. m. on the 31st day of July, 1913, and the proper credit slips for the attention of the bookkeeper were prepared at said time and placed in the bookkeeper's file for attention on the next banking day, although the credit was not made by the bookkeeper in the individual ledger until the 1st of August, 1913. Counsel respectfully submit that the time when T. Mitchell & Co. was credited with said deposit was governed by the time the credit was entered in the bank records, and not by the time when it was entered in the individual ledger.

“The time when a deposit is made is fixed by the time the fund is delivered to the bank and credit therefor given in the depositor's pass book, although the credit to the depositor on the books of the bank is not made until some time afterwards.”

3 R. C. L. 531;

Wasson v. Lamb, 120 Ind. 514, 22 N. E. 729,
16 A. S. R. 342, 6 L. R. A. 191.

Mr. Bruning, the cashier of the bank, when interrogated about the time the garnishment was served on the bank in the case of Rutherford and Widman v. T. Mitchell & Co., testified as follows (Tr. p. 120):

“Q. When was the garnishment in the case of Rutherford and Widman against Mitchell & Co. served upon the bank, Mr. Bruning?

A. My recollection is that it was in the evening of the 31st, at 8 or 9 o'clock in the evening.

Q. Where were you when the papers were served on you?

A. I think I was sitting in the front of the bank there. That was when the bank was over here (indicating).

Q. When the bank was in this store in this building right across the street from the court-house?

A. Yes, that is my recollection.

Q. Was your day's work completed at the time you were sitting there?

A. Yes.

Q. Had these entries that you speak of having been made in the books here, crediting him up, and the charges against the account,—had they been completed at the time this garnishment was served upon you?

A. The books were all locked up.

Q. Had the deposit slip for their account been made out at that time?

A. All finished for the day.

Q. Had the notes been charged against the account and set off against the account before the attachment was levied?

A. The notes and the debits had been made against the account.

Q. Was the account closed, so far as the bank was concerned, at that time?

A. It was.

Q. All that remained to be done was the physical entries in the individual ledger by the bookkeepers?

A. On the following day; yes."

There was introduced in evidence the general deposit slip made out on the 31st day of July, 1913, by Mr. Bruning, the cashier (Tr. p. 111), which was as follows:

"Deposited in American Bank of Alaska, Fairbanks, Alaska, July 31, 1914, under the head of 'checks,'—85 per cent. 267.87 oz. Advanced 16.40, \$3734.12."

An explanation of the method of handling the deposits is made by Mr. Bruning on pages 109-111 of the Transcript. After the gold dust was cleaned by Mr. Hopkins, the gold dust teller, and weighed, he made out a slip, which was introduced in evidence (Tr. p. 112), and is as follows:

"Gold dust purchased. No. 4309. American Bank of Alaska, 7-31-1913. Adv. 267.87. M. & Co. 227.69 3734.12. Hoffman 40.18 659 at 16.40 per oz. Pay to the order of Mitchell & Co. 4393.12. Hop."

Mr. Pratt, testifying for plaintiff, corroborates the time garnishment was served as between 8 and 9 o'clock (Tr. pp. 103-104).

That was on the 31st of July, 1913. The amount of the deposit slip was then credited to T. Mitchell & Co. and the record thereof for the bookkeeper was made by Mr. Bruning, as shown by defendant's exhibit 2, heretofore referred to. The bank book introduced in evidence (Tr.

p. 77) shows a credit of \$3750.27 to T. Mitchell & Co., which was the true value of the gold dust entered in said pass book on August 2, 1913, after said gold dust had been thoroughly cleaned and weighed, the amount shown by Mr. Hopkins' slip being the amount advanced on the gold dust as soon as it was received.

On cross-examination Mr. Bruning testified in regard to the time when the various acts hereinbefore referred to were performed (Tr. p. 146), as follows:

"Q. Give your best estimate of how long it was before that gold dust was cleaned up so that you would know exactly what its value was.

A. I might bring Hopkins up here and he might remember. Hopkins handled the gold dust. All the transaction took place before six o'clock that night. If he got there at four it might have been an hour and a half.

Q. You are sure the whole thing happened, and it was all cleaned up and the amount ascertained before six o'clock?

A. Yes sir.

Q. And just as soon as you got it ascertained, you set it off against the notes and overdraft.

A. As soon as I made out the deposit slip, so that I knew how much the cleanup amounted to, I charged up the notes, as that slip shows.

Q. You made the setoff right then and there?

A. Certainly I did.

Q. Before six o'clock?

A. As soon as—— (interrupted)

Q. (continuing). —on the evening of July 31st, 1913?

Mr. CLARK. Let him finish his answer.

A. Yes sir."

Further, on cross-examination, Mr. Bruning testified (Tr. p. 148) as follows:

"A. I state that the evening or the afternoon that the gold dust was delivered at the bank and the boys were cleaning the dust, that I told Mr. Fallon that their overdraft amounted to so much on the ledger; that I would place the cleanup to their credit as soon as I ascertained what the amount was, and that I would charge the demand notes in the bank against the account."

The evidence shows that Mr. Bruning did not make up his mind not to advance any further moneys until after the garnishment was served, and on cross-examination (Tr. p. 150) the following testimony was given:

"Q. Didn't you make up your mind that you would not cash any more over-checks when you saw that cleanup of \$3734.00?

A. No, I made up my mind when I was served with the garnishment; then I made up my mind that I wouldn't—(interrupted).

Q. Wait. You told this jury that you did all this before six o'clock—(interrupted).

Mr. CLARK. Let him finish his answer.

The COURT. Finish your answer.

Mr. PRATT. Didn't you tell this jury a while ago that that was all finished before six o'clock?

The COURT. You may finish your answer, if you have not finished it.

(Question and answer read as follows: Q. Didn't you make up your mind that you wouldn't cash any more over-checks when you saw that cleanup of \$3734.00? A. No, I made up my mind when I was served with the gar-

nishment; then I made up my mind that I wouldn't——)

A. (continuing). ——that I would not cash any more checks or allow any more overdrafts."

Again (Tr. p. 152), Mr. Bruning testified:

"A. I have told you and will tell it again; that we made the credit as soon as the dust was weighed, and right after that I charged up the notes.

Q. That was before six o'clock?

A. That was before six o'clock."

In explanation of his reason for refusing to allow any further overdrafts we find (Tr. p. 152) the following:

"Q. I tried to get you to tell when it was that you made up your mind that you wouldn't cash any more checks of T. Mitchell & Co.—overchecks. That was six o'clock, was it?

A. No.

Q. When was it?

A. I told you after the garnishment. The testimony will show that I was garnisheed about 8 or 9 o'clock.

Q. Then you made up your mind for a certainty that you would not cash any more checks if they were overchecks?

A. Certainly.

Q. You knew then that Mitchell & Co. didn't have anything on file?

A. I knew they had nothing to their credit.

Q. That meant that you were not going to cash checks at all?

A. As long as I wasn't allowing any overdraft.

Q. Why wouldn't you cash any more checks for them?

A. Because when a house is on fire I am not going to place insurance.

Q. You knew the house was on fire at that time?

A. Certainly. When a man jumps another with an attachment, it is about time to keep hands off.

Q. You knew at six o'clock that your house was on fire, didn't you?

A. I did not.

Q. You didn't think so?

A. No sir."

As an example of the unique theory on which counsel for defendant in error was trying the case, we find in the testimony (Tr. p. 156) the following:

"MR. PRATT: I want to know if that money was deposited in your bank subject to the check of T. Mitchell & Co. at any time; was it deposited there, I mean subject to check at any time after 6 or 8 o'clock in the evening of July 31st, 1913?

(Defendant objects and the Court rules that the witness need not answer until Mr. Pratt explains what he means by 'deposited subject to check').

Q. I mean a fund in your bank that if the depositor should issue a check and somebody should go there with it, that you would pay it?

A. If there is a balance to their credit we will pay it.

MR. PRATT: Ain't that a fair question and a fair understanding?

MR. CLARK: That is a fair understanding.

MR. PRATT: Now, was that sum of money subject to check, in the ordinary way of business now of banking, by T. Mitchell & Co. at any time after 6 or 8 o'clock in the evening of July 21 (evidently means 31), 1913? That is a fair question. Now, answer that, whether it was or not.

A. It was a checking account like all other accounts, and checks will be honored against an account, where there is a balance, or if there is an arrangement for an overdraft.

Q. You call that an answer, do you?

A. Yes.

Q. It just don't answer anything. Would your bank have cashed a check of T. Mitchell & Co. at any time after the hour that I have named?

A. Not after nine o'clock at night; no.

Q. Would you the next day?

A. No.

Q. Therefore, Mitchell & Co. didn't have any deposit subject to check after 6 or 8 o'clock in the evening of July 31, 1913, did they?"

This line of questioning speaks for itself and requires no comment.

At page 159 of the Transcript, Mr. Bruning gives further explanation of the transaction as follows:

"Q. How much was that firm in the red on the evening of the 31st?

A. On the afternoon of July 30th, as well as upon the 31st, at 3 o'clock, when the bank closed, they were overdrawn \$2246.14. Between 3 and 6 o'clock they made a deposit of this amount of gold dust, which was put to their credit, and that wiped out the overdraft and left a balance which was charged up to the notes of \$850.00, \$500.00, and what that other item is.

Q. When did you put those notes on that running account, just as though it was a checking account?

A. As soon as the credit had been placed, that is, when the gold dust slip had been given to me, I made out the deposit slip. I ascertained how much the deposit amounted to above

the overdraft, and I went to work and applied the surplus on those notes; that is, I charged the notes, treated them the same as a check; charged the notes against the account."

From the foregoing it will be seen that all credits were given and offsets made against the value of the gold dust before the close of the bank on the 31st day of July, 1913, and all that remained thereafter to be done was the physical act of entering said credits in the individual ledger by the book-keeper.

The account of the *partnership* was opened with the bank about June 9, 1913 (in fact, June 11, 1913, Tr. p. 77); the *first cleanup* was July 3, 1913, of \$1904, which was turned into the bank, credited to their account and they checked against it (Tr. p. 55); the *second cleanup* was July 16, 1913, of \$2280, which was put in the bank to their credit just the same as the first and checked against (Tr. p. 56); the *third cleanup* was July 31, 1913, of \$3750.14, which was brought to the bank (Tr. p. 59) and "left it there to be blown and credited the same as before" (Tr. p. 63); and "from the 16th to the 31st of July, 1913, we owed the bank a balance of \$4096.04 on notes and overdrafts. That was the total indebtedness of the firm to the American Bank on the 31st of July, 1913" (Tr. p. 60).

This is the evidence of Fallon, the partner having full charge of the matters, and shows that the *same* usual course of dealing with the bank existed and was followed with this *third cleanup* of \$3750.14

that was followed with the first and second cleanups, viz: *credited* to firm account, and notes due and overdraft charged and *set off* against the cleanup, *still leaving an overdraft* due the bank of \$345.90 (Tr. p. 30).

The fact is, that Mitchell & Co. were overdrawn and in debt to the bank for checks drawn, constituting overdrafts from the time they opened their account until the bankruptcy proceeding, and still owe the bank an overdraft of \$345.90.

THE EVIDENCE FOR PLAINTIFF SUMMARIZED.

Fallon, one of the partners, the one who had the full charge of the matters involved here, as a witness for the plaintiff testified:

“The copartnership had an 85 per cent lease on the Hoffman bench or ground. I kept the books. I was looking after the clerical end of it and the commissary end, and I had all dealings with the merchants (Tr. p. 50). The copartnership owned the lease on the Hoffman bench (Tr. p. 51). Prior to June 9, 1913, the debts that we incurred were \$1500; the partnership owed me for the money I had advanced them, and we owed the American Bank of Alaska about \$400 (Tr. p. 53).

The *first* cleanup was on July 3, 1913, and amounted to \$1904, which was turned into the American Bank of Alaska. We had an account there; it was credited to us and I drew checks for everybody, and they were honored—in fact, further than the money that was there to cover it, which made an *overdraft* (Tr. p. 54). We owed the bank \$1400 when the first cleanup was brought in. The checks for *wages* and for merchandise, too, were *all honored* (Tr. p. 55).

The *second* cleanup was July 16, 1913; it was \$2280. We brought it in and put it in the bank. The bank put the gold or its proceeds to our credit just the same, carried along. We checked against it and all checks were honored (Tr. p. 56).

The *third* cleanup was supposed to be in on the 26th, but the water was low and very muddy and it was a very dry season and everyone was up against it, and Mitchell said we better wait until we get a bigger cleanup. We ought to have cleaned up every ten days, but it was postponed until the 30th of July. Mr. Bruning of the bank telephoned me once and wanted to know when the cleanups were coming in. I told him it was postponed until the 28th, and that Mitchell expected a pretty good cleanup; that it would be eight thousand and would cover everything (Tr. p. 57). He said, 'You have no money, and these notes and overdraft here, and he had deposited his note for \$500 to meet the checks to reduce the overdraft. He said, 'I hope you do have a good cleanup.' He made no inquiries after that (Tr. p. 58).

The *third* cleanup was July 30, 1913. It was \$3750.14. I brought it in to the bank on the night of the 31st, between 5 and 6 o'clock. We then owed the bank \$1504, represented by notes of \$850, overdraft of \$133 and \$500 on deposit to reduce the overdraft, making it \$1504 (Tr. p. 59).

Our indebtedness to the bank on July 31, 1913, was \$4096.14 on notes and overdraft. For *labor* the bank *paid* \$3071.50 *in labor checks*, and for bills, merchandise and one thing and another (Tr. p. 60), \$1804, from the 16th to the 31st of July, 1913. The indebtedness for labor on that date was \$6773 (Tr. p. 60). As shown by our schedules we owed for other accounts \$7532.75. We had, as shown by our schedules, \$1786 in mining machinery and out-

fit, and assets and liabilities, as shown by our schedules on July 31, 1913 (Tr. p. 61). We still had the lease of the mining property on July 31, 1913 (Tr. p. 62).

The gold dust of our *third* cleanup, *I took it into the bank* (Tr. p. 62). Mr. Hopkins was tending me. I waited to see it weighed up, and it corresponded with our weight out there, and *I left it to be blown and credited the same as before*. I went in between 7 and 8 o'clock to see if it was cleaned up yet, and it was not, and I said: '*I will call in the morning*' (Tr. p. 63). I went in about 9:20 o'clock *in the morning* and I asked for my book. Mr. Bruning said, 'Jim, I am sorry to tell you that it has been my instructions to get all overdrafts in, and I have applied it and disbursed it.' He gave me my book and vouchers, and he said he couldn't carry me any longer (Tr. p. 63). I left my book when I left the gold dust. He did not return it *that* morning, but did the *next* morning, the morning of August 2nd. After he told me that I said, 'Mr. Bruning, good gracious, I have made out the checks for the men. Are you not going to carry us a little while longer?' He said, 'I have got to get all the overdrafts in. It is my instructions. I have got to carry them out.' And I said, 'Well, we are up against it then; we can't check against that dust' (Tr. p. 64).

There were \$3071 *labor* checks and \$1800 paid by the bank between the 16th and the 31st. The amount of our indebtedness up to July 31, 1913, *for labor* would be, deducting \$3071 from the total, would leave \$3000 (Tr. p. 69).

Mr. Bruning and I did *not* discuss the affairs of the partnership and venture, any more than to say, 'Well, how is she going?' Of course, the *second* cleanup I brought in, the mine was beginning to show up a little better, and we had bright hopes for the next cleanup, that it

would be considerably better and that we would be able to wipe out all our obligations (Tr. p. 71). When the cleanup came in *I didn't talk* with Mr. Bruning that night. I just handed the dust to Mr. Hopkins, who said he would attend to it immediately. And when I went back there Mr. Bruning was there, and he said, 'We are not quite ready yet, Jim.' I said, 'Let her go until the morning.' So I went home (Tr. p. 71). I had the gross amount of the gold dust, on the night of the 31st, the same as it tallied when Paul Rettig weighed it up.

MR. MARQUAM: On the 31st of July, 1913, or at any other time, did Mr. Bruning or any other member of the bank make inquiry of you in regard to your financial standing or the financial standing of the firm or its individual members, that you did not answer?

A. No, sir, they never inquired of me (Tr. p. 72).

Our bank book shows that on July 31, 1913, there was *placed to our credit* \$3750.27. That is the gold dust, the money derived from the sale of the gold dust. They paid us \$16.47 per ounce.

And all the other money that we deposited in the bank in connection with our mining was deposited with the bank and entered up in this book with the vouchers (Tr. p. 73).

The first and second cleanups were also entered in our bank book, as well as the third cleanup.

August 2, 1913, they balanced up my book and returned our vouchers, showing they had paid out and cashed \$6329.70 since it was balanced before. They *credited* our account with this *last cleanup* and charged against our account the notes that we have there, and that still left us an overdraft of \$133.70. They did *not* treat this *third* cleanup any different from

what they treated any other deposit in the way it was entered up. They put it in just the same as the others, but instead of acknowledging that they could check against it—to be checked against. I couldn't issue any checks against it, because it was all taken up on the overdrafts and the checks that had been issued during the cleanup, between the time of the cleanup (Tr. p. 74).

Mr. Bruning had deposited \$500 to our credit to carry us along. He put in his own note to the bank to cover that overdraft" (Tr. pp. 75-76).

The bank book of Mitchell & Co. was in evidence, as follows:

DEFENDANT'S EXHIBIT "1."

(Tr. p. 77)

Dr. American Bank of Alaska in acc't with Mitchell & Co. Dr. 1913

June 11	Deposit	400.	July 16 1913	Checks as	
19	"	100.		per List 51	Vouchers
July 3	135.81 at 16.50	1904.75		Ret'd	3353.65
7	Deposit	165.19			
8	"	850.			
	Overdraft	133.71			
		<hr/>			
		3353.65			<hr/>
					3353.65
July 18	85 per cent of				
16.50			Jul 16 1913	Overdraft	133.71
158.70 oz.		2213.14	Aug 2 67	Cks per list	6329.70
July 19	Dep. by A. Brun-				
	ing to reduce overdraft	500.			
July 31	85 per cent	267.87			
	at 16.47	3750.27			
		<hr/>			
		6463.41			<hr/>
					6463.41

“Work was going on while I was in here on the 31st of July. They were continuing work. The ground looked fairly good at that time. The ground was looking better. It was getting better as we went along (Tr. p. 78).

During that period I called up Mr. Bruning and asked him if he would not honor the checks until the cleanup got in. He said that was all right. I told Mr. Bruning on the morning of August 1st that the ground was looking very good and we were going ahead (Tr. p. 80).

I never told Mr. Bruning at any time that things were not looking well out there (Tr. p. 80). I recognized that Mr. Bruning had done the best he could (Tr. p. 81).

I never told Mr. Bruning or gave him any intimation as to the amount of checks that were outstanding, only a simple statement that the checks for the full amount of these wages were outstanding (Tr. pp. 83, 84).

Harry E. Pratt, attorney for the creditor who garnisheed the bank, testified *for plaintiff* that the garnishment was served about 8:30 or 9 o'clock in the evening of July 31, 1913. Mr. Pratt said he asked what he caught with his garnishment, and they replied that he didn't catch anything. Mr. Pratt asked how about that cleanup that came in this afternoon? They said in reply, 'They were away in the red to us, and we just *credited* that cleanup and they are still away in the red' " (Tr. pp. 103-104).

Judge Pratt, for plaintiff, asked Fallon:

“Q. State *when* it was that *you notified* Mr. Bruning that *if the checks* of that firm would *not be honored* that you would *have to shut down*?

A. Well, Judge Pratt, those words never came out of my mouth in my testimony, about me *shutting down*.

Q. Some *different* words?

A. No, sir" (Tr. p. 171).

We ask the Court to bear in mind, first, that the bankruptcy petition was *filed August 23, 1913* (Tr. p. 25); second, that it was an *involuntary petition*; third, that these partners *confessed* that they were *then* unable to pay their debts and *consented* that they be adjudged bankrupt (Tr. p. 25); fourth, that their schedules show they owned property valued at \$3286 (Tr. p. 38); that there is nothing stated as to their *lease or its value*, either in the schedules or in the evidence on the trial, although it was growing *richer* with each cleanup, the *first* \$1904 (Tr. p. 54), the *second* \$2280 (Tr. p. 56), and the *third* 3750.27 (Tr. p. 74); fifth, that the *bank paid* out for *labor checks* \$3071 between July 16th and July 31st, 1913 (Tr. p. 60); sixth, that they asked the bank to honor the checks *until the cleanup got in* (Tr. p. 79); seventh, that the *period* of time involved in all of the business relations between the bank and Mitchell & Co. was from June 11, 1913, when they commenced with their first bank transaction and July 31, 1913, one month and twenty-one days, when the gold dust was sold to the bank, credited to Mitchell & Co. and *offset* against their indebtedness (Tr. p. 77, Tr. p. 53); eighth, that the bank honored their checks and paid out for them during that period \$9683.35 (Tr. p. 77), and received and bought and credited gold dust from their three cleanups, \$7934; ninth, that from July 16th to July 31st, fifteen days, the bank *paid* out for *labor checks*

on plaintiff's own evidence \$3071 (Tr. p. 60) and while the evidence does not clearly show the *labor checks* paid by the bank from June 11 to July 16, 1913, thirty-five days, it may fairly be assumed that the bank paid for their *labor checks* during that period at least one and one-half times as much, viz: \$4606, making a total of \$7677 paid by the bank *for labor*; and as to those *labor checks paid* by the bank, the bank is entitled *to be subrogated*, and be reimbursed as being in the *same class* as the unpaid *labor* which is of the same class; so that, under no possible view or circumstances could the \$3750.27 of the third cleanup be considered a preference to the bank or be held to give the bank a greater percentage of its claim than the other *labor* claims of the *same class*.

Herman Fawcett, another of the partners, testified for plaintiff:

"I heard there was to be an attachment served against the gold dust, and I went in to find out whether anything could be done. I understood the man who was levying was Jack Nelson. I asked Mr. Bruning and he said 'No, that it could not; *it had been applied* to overdrafts and *checks* that had been left there for collection' " (Tr. pp. 100-101).

Mr. Bruning's evidence will be found at pages 107 to 169 of the *Transcript*, and is full, clear and given after a most *searching* cross-examination, showing absolutely no facts or knowledge or grounds of belief, *either* that the partnership was insolvent *or* what their total or any indebtedness was, *or* that

he was effecting or intending to *or* did effect a preference or obtain a greater percentage over others of the same class or of a different class, when he credited the value of the third cleanup and offset it against their indebtedness to the bank.

Not only that, but that he had not refused and had not intended to refuse to allow them to check or to honor their checks, *until* after and between 8 or 9 o'clock of July 31, 1913, when the *garnishment* was served upon the bank (Tr. p. 153), which was between 8 and 9 o'clock of July 31, 1913 (Tr. p. 103); and then, for the *first* time, he knew someone was suing them and that they were in some trouble.

There is not a syllable of evidence in the record showing that the bank or anyone connected with the bank knew or had heard or had any grounds or reason to believe or even suspected they were insolvent or in financial difficulties, or what they owed, until the petition in involuntary bankruptcy and their schedules were filed *after* August 22, 1913 (Tr. p. 25).

Certainly, the bank would *not have paid* \$3071 *labor checks* (Tr. p. 60), between July 16th and July 31st, 1913, had the bank either known, or believed, or suspected, that Mitchell & Co. were insolvent or in financial difficulties, when they paid these \$3071 of *labor checks*, and Mitchell & Co. *already* owing them *then* a large sum for notes and overdrafts.

In *Foster v. McAlester*, 114 Fed. 145, 52 C. C. A. 107, the Circuit Court for the Eighth Circuit said:

“Fraud cannot be inferred either by the Court or jury from acts legal in themselves, and consistent with an honest purpose. The settled rule on this subject is that slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud. They must not be, when taken together and aggregated, when inter-linked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting.”

In *Nichols v. Elken*, 225 Fed. 689, 140 C. C. A. 563, the Circuit Court of Appeals for the Eighth Circuit used this language:

“Mere suspicion, of course, is not sufficient to charge the defendants with knowledge of, or reasonable cause to believe, Tilden’s insolvency at the time of these payments; but there must be evidence of facts sufficient to put a reasonably prudent person upon inquiry, which, if pursued, would show that Tilden was insolvent and that a preference would be the result of making these payments.”

The remarks of the Federal Supreme Court in *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971, are pertinent here. It was said:

“It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor’s insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the busi-

ness transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires for that purpose that his creditor should have some reasonable cause to believe

him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man.

It is on this distinction that the present case turns. It cannot be denied that the officers of the bank had become distrustful of Miller's ability to bring his affairs to a successful termination; and yet it is equally apparent, independent of their sworn statements on the subject, that they supposed there was a possibility of his doing so. After obtaining the security in question, they still allowed him to check upon them for considerable amounts in advance of his deposits. They were alarmed; but they were not without hope. They felt it necessary to exact security for what he owed them; but they still granted him temporary accommodations. Had they actually supposed him to be insolvent, would they have done this?"

In *In re Wright-Dana Hardware Co.*, 212 Fed. 397, 400 et seq., the Circuit Court of Appeals for the Second Circuit said:

"The right of a bank to a set-off as against a bankrupt depositor was passed upon by the Supreme Court of the United States in *New York County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, a case which went up from this circuit, and which was decided in 1903. The bank in that case, as in this, had exercised a right of set-off, and it was claimed that the transaction amounted to giving a preference to the bank by enabling it to receive a greater percentage of its debts than other creditors of the same class. But the Supreme Court upheld the bank's right to the set-off. The Court in reaching its conclusion said that a deposit of money to one's credit in a bank did not operate to diminish the

depositor's estate, for when he parted with the money he created at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor might see fit to draw a check against it. It did not amount to a transfer of property as a payment, pledge, mortgage, gift, or security. It continued:

'It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of section 68-a. If this argument were to prevail, it would, in cases of insolvency, defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of the debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full.'

The question came before the Supreme Court again in *Studley v. Boylston National Bank*, 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313, decided in 1913, where it was held that nothing in the bankruptcy act deprives a bank with which the insolvent is doing business of the rights of any other creditor taking money without reasonable cause to believe that a preference will result; and, it being found that the deposits and payments of notes were not made to enable the bank to secure a preference by the right of set-off, the bank had a right to set off the deposits against the notes within four months of the bankruptcy.

But conceding the law to be as above stated, it is insisted that the facts of the case at bar are such as to deprive the Utica City National Bank of the right of set-off which, under other circumstances, it might exercise. Our attention is called to the fact that the referee found that the Wright-Dana Company was insolvent on September 15, 1911 (four months before bankruptcy), and continued to be insolvent to the date of its adjudication in bankruptcy on February 5, 1912, and that during the whole of that time the fact of its insolvency was known to the bank. All this may be true and yet not deprive the bank of its right of set-off. A bank may do business in the usual manner with one it knows to be insolvent. The mere fact of insolvency, or mere knowledge of the insolvency of the depositor, is not alone sufficient to take away the bank's right of set-off. As said in *Studley v. Boylston National Bank*, supra:

‘There is nothing in the statute which deprives a bank, with whom an insolvent is doing business, of the rights of any other creditor taking money without reasonable cause to believe that a preference will result from the payment. The Bankruptcy Act contemplates that, by remaining in business and at work an insolvent may become able to pay off his debts. It does not prevent him from continuing to trade, depositing money in bank, drawing checks, and paying debts as they mature, either to his own bank or any other creditor. It does provide, however, that if bankruptcy ensues, all payments thus made within the four months’ period may be recovered by the trustee, if the creditor had reasonable cause to believe that a preference would be thereby effected.’ ”

V.

BURDEN OF PROOF IS ON TRUSTEE TO PROVE BANK HAD REASONABLE GROUNDS TO BELIEVE THAT MITCHELL & CO. WERE INSOLVENT ON JULY 31, THAT RECEIVING AND CREDITING GOLD DUST TO THEIR ACCOUNT WOULD GIVE BANK GREATER PERCENTAGE THAN OTHER CREDITORS OF SAME CLASS, AND THAT OFFSETTING AGAINST INDEBTEDNESS WOULD EFFECT AN UNLAWFUL PREFERENCE.

Clifford v. Morrill, 230 Fed. 190, decided in January, 1916, very clearly shows what this *burden* is and how it must be met by the trustee, and had many circumstances showing embarrassment, attachment, etc., of the *debtors*, but none of which were sufficient to meet the requirements of the *present* Bankruptcy Act, as sufficient to justify holding a *payment preference* there to be voidable.

That Court said:

“MORTON, District Judge. That Morrill had reasonable cause to believe that the Somerset Woolen Company was insolvent, *in the common-law meaning of the term, is clear*. The *change in the definition of “insolvency”* made by the *present* Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) *greatly increases the burden on the trustee* in cases of this character. It *now* devolves upon him *to show* that the defendant *had reasonable cause to believe that the bankrupt’s property, at a fair valuation, was less than its indebtedness at the time when the payments in question were made*. This seems to require either *actual knowledge* of the property and debts *on the part of the person receiving the alleged preference*, or *knowledge by him of circumstances warranting the inference that the debts probably exceeded the prop-*

erty. No knowledge of the first sort is brought home to Morrill. He did not know of the Feiner mortgage; but *he does not seem to have been intentionally shutting his eyes to the facts or evading knowledge of them.*

‘It is clear that the creditor cannot be said to have had reasonable cause to believe such a preference was intended, unless the evidence shows that it knew, or ought to have known, the substantial truth as to the bankrupt’s financial condition.’ Dodge, J., *In re Houghton Web Co.* (D. C.), 185 Fed. 213, 214, 26 Am. Bankr. Rep. 202, 204.

Such inferences of insolvency, if any, as might be drawn by Morrill or his attorney from the mortgages, the slowness in paying him, and the failure promptly to get rid of his attachment—and there is little else on which to find ‘reasonable cause to believe’—are to be considered in connection with Morrill’s ignorance of the total indebtedness of the Somerset Woolen Company, the hopeful assertions of its managers, the misleading statements of condition made by them, the appraisal which had been exhibited to him, the facts that the company was running its plant as usual and did not appear to be in difficulties with any other creditors, and various other circumstances tending to repel such inference. On all the evidence it is not shown that Morrill, at the time when he received any of the payments in question, had reasonable cause to believe that the Somerset Woolen Company was insolvent, or that the effect of the payments would be a preference to him over other creditors.”

See, also, cases hereinbefore quoted to the same effect.

VI.

LABOR CLAIMS HAVE A CLASS PRIORITY UNDER THE BANKRUPTCY ACT, SECTION 64-b, AND THE PLAINTIFF'S EVIDENCE SHOWS THAT DURING THIS SAME PERIOD OF THE THIRD CLEANUP, JULY 16TH TO JULY 31, 1913, FIFTEEN DAYS, THE BANK PAID \$3701 LABOR CHECKS, AND PRESUMABLY THE SAME AMOUNT BEFORE DURING THIRTY-FIVE DAYS, AND THE BANK WAS SUBROGATED TO THE LABOR CLASS FOR THOSE PAID LABOR CLAIMS, EXCEEDING THE \$3750.27 DEPOSIT.

The bank paid \$3071 for *labor checks* (Tr. p. 67) from July 16 to July 31, 1913, fifteen days, and presumably double the same amount from the time it commenced paying on June 11, 1913, thirty-five days more, or \$6142 a total of \$9213. The *total labor* claims were \$6773 (Tr. p. 60). The balance of *labor* claims, after deducting the \$3071 so paid by the bank was \$3702.

Claims for labor have *priority* by section 64-b of the Bankruptcy Act, and as the bank is entitled to be *subrogated* to the claims of the *class* it paid the \$3071 for, viz.: *labor checks*, it received out of the \$3750.27 of gold dust on July 31, \$679 greater than the bank's percentage of that class, *labor*, whose claims to the amount of \$3071 it had so paid (Tr. p. 67), and taking the total assumed of *labor* claims paid by the bank during the previous *thirty-five days* as double or even as only *half* that sum, would make the bank's percentage \$4606 or \$856 less than it received, as the schedules show \$3286

of assets (Tr. p. 38) applicable to the payment of *labor* claims, having *priority*.

How then, is it possible to say the bank received a *larger percentage* than any other *labor* creditor of the same (labor) class? That is the *test* in section 60-b, of the Bankruptcy Act of a *voidable* preference.

In *Lowell v. International Trust Co.*, 158 Fed. 781, 783, 784, the Circuit Court of Appeals for the First Circuit, where a voidable preference, *by payment*, was asserted, the Court held:

“The plaintiff also urges on us that in *New York Bank v. Massey*, the bank took no action formally or otherwise, but merely left it to the law to offset the deposit made by the bankrupt against his indebtedness, while in the case at bar we must accept the statement that the defendant charged up its demand loans against the deposit, or, in other words, went through the formalities of certain alleged journal entries. This, however, was ineffectual either way, whether to benefit or prejudice the *International Trust Company*. It only gave expression to what the law itself would accomplish, that is, it cleaned up the set-off and left it where the law itself would have left it. At law, it takes two parties to accomplish an effectual payment, both a payor and a payee. Sometimes, of course, the law appropriates moneys in payment, or permits the creditor to do it; but that is in consequence of some express or implied understanding between the parties. In such instances an intention on the part of both parties to make payment on some indebtedness underlies what the law accomplishes, and the law is called in only because, while payment is intended, the particular item of indebt-

edness to which it shall be appropriated is not specifically point out. In no sense, however, is a deposit like the deposit here payment, or intended as payment. This is the first condition of the decision in *New York Bank v. Massey* and a vital one; because, if a deposit in the usual course of business may be in the nature of a payment, an unlawful preference would necessarily be involved under the circumstances of either *New York Bank v. Massey* or the case at bar, a suggestion of a possibility which the Supreme Court was compelled to negative.

“What the International Trust Company did in the case at bar more than what was done in *New York Bank v. Massey* was, as we have said, simply to give form to what the law itself accomplished in substance. *Moreover, if what was done* by the International Trust Company in distinction from what was done by the creditor in *New York Bank v. Massey*, *accomplished a preference, and for that reason was invalid or had been invalidated, the condition prior to the charging up the demand loans would have been restored by force of law, and the deposit would remain with the International Trust Company, precisely as it did in the case before the Supreme Court, and also the law would be left to operate in precisely the same manner.* All this, therefore, raises no substantial difference which we can discover to relieve us from the conclusions of the Supreme Court in the case on which the International Trust Company relies.

In addition to the above, we refer to the decision of the Circuit Court of Appeals in the Seventh Circuit in *Re George M. Hill Co.*, 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68. This case was decided only a few months after *New York Bank v. Massey*, and at page 318 of 130 Fed., at page 564 of 64 C. C. A. (66 L. R. A. 68), it was rested thereon. In that case it appears, at page 316 of 130 Fed., at page 563

of 64 C. C. A. (66 L. R. A. 68), that two days before the filing of the petition in bankruptcy the creditor bank appropriated the balance of the deposit account precisely as was done in the case before us. No distinction was made by the Circuit Court of Appeals on that account. It is true that the attention of the court does not seem to have been specifically called thereto; but the facts indicate that none of the parties to that litigation perceived any distinction on account thereof."

Therefore, as that Court held, if what the Bank of Alaska did by *offsetting* the deposit of the gold dust against the indebtedness of the partnership was in any way at the time improper, the result would be that *the deposit was still with the bank at the time* the petition in bankruptcy was filed, and under the Bankruptcy Act, section 68-a, the case of *a deposit* in the bank to the credit of the partnership and *an indebtedness* to the bank against the partnership *existed*, and the Bankruptcy Act itself *offsets* the deposit credit against the indebtedness to the bank, and the result is exactly what the bank itself did on July 31st, 1913, and the trustee could not recover the deposit.

VII.

**THE GENERAL VERDICT IS INCONSISTENT WITH THE ANSWERS
GIVEN TO THE THREE SPECIAL INTERROGATORIES, AND
THE ANSWERS TO THE THREE SPECIAL INTERROGATORIES
REQUIRED A JUDGMENT FOR DEFENDANT.**

The jury, by their affirmative answer to the *first* special interrogatory (Tr. p. 191) found, as a matter

of fact, that the American Bank of Alaska, on the 31st of July, 1913, purchased from T. Mitchell & Co. gold dust of the value of \$3,734.12, and if said gold dust was purchased from said Mitchell & Co. at that time the relation of debtor and creditor immediately arose between said copartnership and said bank, the bank being then indebted to said Mitchell & Co, for the value of said gold dust, and the evidence conclusively shows, and is not denied, that Mitchell & Co. were at said time indebted to the bank for overdrafts and the proceeds of promissory notes in a sum in excess of the value of said gold dust so purchased. Therefore, mutual debits and credits existed between the bank and Mitchell & Co., which, under the law, should have been set off as against each other in a Court of bankruptcy. If said gold dust was sold to the bank, then the gold dust itself ceased to be the property of Mitchell & Co., and they thereupon became entitled merely to a credit on their account for the value of said gold dust. All the evidence shows that the gold dust was sold to the bank before 5 o'clock in the afternoon of the 31st of July, 1913.

The jury failed to agree upon the second special interrogatory, which was as follows:

“Were the proceeds of said purchase deposited to the general bank account of Mitchell & Co. at the time of said purchase?”

and likewise failed to agree upon an answer to the third question, which was as follows:

“Did the defendant bank, at the time it credited said gold dust to the deposit account of Mitchell & Co., set off the amount of the overdraft due from Mitchell & Co. and their then past due note, against said deposit account?”

The jury agreed upon an answer to the fourth question (Tr. p. 191), finding affirmatively thereon. Said question was as follows:

“Did the defendant bank, *at the time it set off* the overdraft and overdue notes *against the deposit account* of Mitchell & Co., have reasonable cause to believe that the firm of T. Mitchell & Co. was insolvent?” (Tr. p. 191).

They also found affirmatively on the fifth question (Tr. p. 192), which was as follows:

“Did the defendant bank, *at the time it set off* the overdraft and overdue note of Mitchell & Co. *against the deposit account*, have reasonable cause to believe that, by so doing, a preference would be thereby effected?”

We there find that the jury could not agree as to whether or not the proceeds of said purchase were deposited to the account of Mitchell & Co. at the time of the purchase, when they failed to answer the second question; but by their *answer to the fourth question they find affirmatively that a set-off had taken place of the overdraft and overdue notes against the deposit account of Mitchell & Co.* Therefore they must have found that the money was placed in the deposit account of Mitchell & Co. although they tried to avoid committing themselves on this point by refusing to answer the second

interrogatory. Likewise, in question No. 4 they find that the bank did offset the overdraft and overdue notes against the deposit account of Mitchell & Co., while they try to avoid the question by refusing to answer interrogatory No. 3. The jury likewise find in their answer to the fifth question that the bank set off the overdraft and overdue notes against the deposit account of Mitchell & Co.

It is respectfully submitted that, if the gold dust was purchased on the 31st of July, 1913, by the bank from Mitchell & Co., thereupon the right of setoff immediately arose, and there could be no foundation whatsoever for a finding in favor of the plaintiff, and the question as to the time when the setoff was made or the time when the amounts were credited to Mitchell & Co. become absolutely immaterial.

If it was a purchase it was not a delivery of a commodity for the purpose of settling an indebtedness. If it was a credit in favor of Mitchell & Co. remaining in the possession of the defendant, the general law and the bankruptcy law will give the defendant the right of offsetting said credit against any account that it had against Mitchell & Co., and were this not done by the bank, the trustee in bankruptcy must of necessity, under the bankruptcy law, make the setoff himself.

There was not one particle of evidence of any description to indicate in any way that the bank had any knowledge of the insolvency of the firm of

Mitchell & Co. or that a preference would be effected by a setoff, if a preference could be treated in that connection, and we contend that it could not be, as a preference has a distinct legal meaning and does not vary the law relative to setoffs.

By their special verdict the jury found all the facts necessary to entitle them to bring in a verdict in favor of the defendant, and on the face of the two verdicts, considering them together and considering the jury's failure to decide upon the answers to special interrogatories Nos. 2 and 3 and to consider the instructions given by the Court, it is obvious that the jury desired to find in favor of the plaintiff in spite of the evidence and in spite of the instructions of the Court. /

It is very evident from the verdict that the jury did not understand, or would not follow, the instructions of the Court as to the rights of the defendant regarding setoff, when they found affirmatively that the bank purchased the gold dust on the 31st of July, 1913, and then found a general verdict against the defendant.

Defendant contends that the three elements necessary to be established in order to entitle the defendant to a decree were as follows:

(1) That the gold dust was purchased from Mitchell & Co. by the defendant bank, thus creating the relation of debtor and creditor.

(2) That the money was deposited to the credit of T. Mitchell & Co.—this merely for the purpose of wiping out the overdraft.

(3) That the overdue notes were actually charged against said account.

All these facts were found by the jury in favor of the defendant, yet they brought in their general verdict in favor of the plaintiff.

It is further contended that no judgment should have been entered on the verdict of the jury so long as their affirmative answer stood to the first special interrogatory, for the other acts performed by the bank after the purchase of the gold dust were merely incidental and were not necessarily performed by the bank, and had they not been done by the bank the trustee would have been compelled to do them, under the direction of the referee in bankruptcy.

Evidence of the fact that the jury wilfully or in ignorance disregarded the instructions of the Court is found by a perusal of the 12th instruction given by the Court (Tr. pp. 179-180), wherein a preference is defined as follows:

“A preference consists in a person (1) while insolvent, and (2) within four months of the bankruptcy, (3) procuring or making a transfer of his property, (4) the effect of which will be to enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class.”

In this case there was no transfer of the property of Mitchell & Co.; they sold the gold dust and it then became the property of the bank. They did not pay to the bank the money arising from the

sale of said gold dust, but it was left there in the regular course of business, and the application thereof was made by the bank for the purpose of offsetting the indebtedness of Mitchell & Co. in the due course of business and without consulting Mitchell & Co. in any way.

Furthermore, in the 14th instruction the Court instructed the jury in part as follows:

“A deposit of money in a bank, upon an open account subject to check, is not a transfer constituting a preference, although the bank, as a creditor, has a right to set off its claims against the deposit, and the action of a bank in applying a deposit or any portion thereof upon a depositor's indebtedness to the bank does not constitute a preferential transfer, if received in good faith by the bank in due course of business; and if you find from the evidence in this case that the bankrupt sold certain gold dust to the American Bank of Alaska, in good faith and in the due course of business, with the intention that said money be placed to the bankrupt's general account in said bank, and that such deposit was so made, then I instruct you that the bank had the absolute right to set off against said deposit any overdraft due from the bankrupt and any notes then due from the bankrupt to said bank” (Tr. pp. 180-181).

The jury found, as a matter of fact, every affirmative allegation necessary to make said Instruction No. 14 directly applicable to the case at bar, and having found that the gold dust was sold to the bank, that the money was deposited to the general account of Mitchell & Co., and that the bank did set it off against the indebtedness due from said Mitchell &

Co., they clearly and unequivocally disregarded the instructions of the Court when they brought in a verdict for the plaintiff.

There is not one particle of evidence in the case of any probative force whatsoever that indicated in any way that the bank had any reason to suppose that Mitchell & Co. were insolvent, or that by setting off their claims against Mitchell & Co. against the deposit account a preference would thereby be effected; for Mitchell & Co., at the time they sold said gold dust to the bank, expected to continue with their work; the ground was looking better, and they had no idea of any trouble impending, or that they would be forced into bankruptcy; and on the contrary, referring to July 31, when Fallon was notified by the bank, by Mr. Bruning, that they could not honor any more overdrafts, Mr. Fallon testified in answer to the trustee's counsel, Mr. Pratt:

“Q. State when it was that you notified Mr. Bruning that if the checks of that firm would not be honored that you would shut down?

A. Well, Judge Pratt, *those words never came out of my mouth* in my testimony, about me shutting down.

Q. Some different words then?

A. *No, sir.*” (Tr. p. 171.)

The Court instructed the jury in the 11th instruction that:

“A transfer can not be avoided simply on proof that the creditor had doubt or suspicion

that a preference was intended, for it is not enough that the creditor has some cause to suspect the insolvency of the debtor, but he must have such knowledge of fact as to induce a reasonable belief of his debtor's insolvency." (Tr. pp. 178-179.)

Is there any evidence in the record of any intention on the part of Mitchell & Co. to effect a preference? On the contrary, all the evidence shows that they expected to continue to draw against the bank, thinking that they would be granted further courtesies in the way of an overdraft, and they had no idea at the time they sold the gold dust to the bank that they would not be permitted to continue to draw against the bank the same as theretofore. A bank has the absolute right to say when it shall or shall not extend credit, and its duty to its depositors and to its stockholders requires that it take every precaution to prevent loss. After the purchase of the gold dust a creditor of Mitchell & Co. attempted to attach the bank account, and had the bank thereafter permitted overdrafts it would not only have been guilty of bad management, but would probably have been criminally negligent had any loss occurred.

It is respectfully submitted, judgment for the defendant should have been given upon the jury's findings in answer to special interrogatories one and four (Tr. p. 191).

VIII.

ERRORS IN RULINGS ON THE TRIAL.

Plaintiff in error insists that the Court erred in the following rulings upon the trial, hereinbelow *numbered* to correspond to the numbers of the assignments of error (Tr. pp. 215-246):

(2) In refusing the motion of defendant for a *directed* verdict at the close of plaintiff's case (Tr. pp. 106-107).

(4) Overruling defendant's motion for a *directed* verdict at the close of defendant's case (Tr. pp. 172-173).

(8) Denying defendant's motion for a *judgment notwithstanding the verdict* (Tr. pp. 195-197).

(9) Overruling motion of defendant for a *new trial* (Tr. pp. 197-203).

(10) In entering judgment for plaintiff upon the verdict (Tr. pp. 203-204).

 IX.

ERRORS IN RULINGS ADMITTING EVIDENCE ON TRIAL.

The Court erred to the prejudice and injury of defendant in its rulings *allowing* evidence on the trial, as follows:

(13) Allowing the *schedules* in the bankruptcy proceeding in evidence (Tr. pp. 28-38).

(14) Allowing in evidence the adjudication of Fallon, Fawcett and Mitchell— individuals, *not of the firm*, in evidence (Tr. pp. 38-40).

(16) and (17) Allowing in evidence and refusing to strike out trustee's bond in the bankrupt estate of Fallon, Fawcett and Mitchell, as individuals and *not of the firm* (Tr. pp. 43-44; 47-49).

X.

ERRORS IN INSTRUCTIONS TO THE JURY.

The Court erred to the injury and prejudice of defendant in giving the following instructions to the jury (Tr. pp. 173-183, shows the whole charge to jury):

1. The Court erred in giving to the jury instruction numbered "13", (Tr. p. 180) reading as follows:

"If the jury finds from the evidence that on the 31st of July, 1913, the firm of T. Mitchell & Company did *not make a deposit* subject to check as hereinafter defined to you in these instructions, *but did make a payment of a past due indebtedness*, and that at that time the firm of Mitchell & Company was insolvent, and that said defendant bank had reasonable cause to believe that by accepting a payment it would secure an *unlawful preference*, and by so doing would secure a larger percentage of its debts than other creditors of the same class, then I instruct you *such a payment*, if you find it to be a *payment*, would be an *unlawful preference*, and your verdict should be for the plaintiff" (Tr. p. 180).

This instruction is absolutely contrary to the allegations of the amended complaint, which makes no claim *of payment*, but alleges *a sale* to the bank with intention that value of the gold dust *be credited* to Mitchell & Co. in their general account in the bank so they could check against it (Tr. par. VII, pp. 6-7).

This instruction is also contrary to *all* the evidence in the case on behalf of both plaintiff and defendant. There was not at any place in the trial the remotest suggestion that the gold dust was delivered or sold *as payment* or received by the bank as payment.

The Court had already, in instruction "9" (Tr. p. 177), instructed the jury that the offset by the bank of note due, was *not a transfer of property* by the bankrupt. There was never any claim of a *preference by payment*; and the result of this instruction was prejudicial and injurious to defendant.

This instruction also limits the right of the bank to set off "*a deposit subject to check*", which is not the law; it may be a deposit, not subject to check, but still subject to setoff, unless it be special creating a trust or a bailment, and such like, of which there is absolutely nothing in the pleadings or evidence in this case.

2. The Court erred in giving to the jury instruction numbered "10" (Tr. pp. 177-178) as follows:

"The Court instructs the jury that the word 'insolvent' as used in the pleadings in this case, means that on the 31st day of July, 1913,

the aggregate of all the property belonging to the copartnership firm of T. Mitchell & Co., and that of T. Mitchell, J. J. Fallon, and Herman Fawcett, the individuals composing such firm, was not sufficient at a fair valuation to pay the debts of such copartnership firm.

The phrase 'reasonable cause to believe the transfer would effect a preference' means, as applied to the pleadings and evidence in this case, that at the time of such setoff by the defendant bank, some one or more of its officers had knowledge concerning the financial affairs of said copartnership firm of T. Mitchell & Co., sufficient to induce the belief in their minds of the insolvency of said firm, and that such setoff would effect a preference in its favor over other creditors. Actual knowledge of insolvency and that the setoff would enable the bank to get a greater percentage of its debt than other creditors of the same class might or could get, is not necessary or required under the bankruptcy law, but 'reasonable cause to believe' such insolvency and preference is all that the plaintiff is bound to establish by a preponderance of the evidence" (Tr. pp. 177-178).

This instruction attempts to *define the* meaning of "*insolvent*", and is injuriously and prejudicially incorrect, and is not the definition of "*insolvent*" as given in the Bankruptcy Act itself, as follows:

"(15) A person shall be deemed *insolvent* within the provisions of this act whenever the aggregate of his property, *exclusive of any property* which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

Bankruptcy Act, section 1 "(15)".

Again, it tells the jury that “reasonable cause to believe the *transfer* would effect a preference” means, if “*some one or more of its officers*” had knowledge concerning the financial affairs of the *copartnership* firm of T. Mitchell & Co. sufficient to *induce* the belief in their minds of the insolvency of the firm, and that such setoff would effect a preference in its favor *over other* creditors.

“Some one or more of its officers” is not sufficient; it must be some officer *in charge of or connected with* the transaction in controversy, or *the* officer who is acting in the matter accomplished.

The word “*transfer*” is also erroneous, as there is no question of “transfer” of any property under the pleadings or evidence in this case, and the jury undoubtedly assumed the word “transfer” to refer to the *transfer of credit* on the *books* of the bank.

XII.

ERROR IN REFUSING INSTRUCTIONS REQUESTED BY DEFENDANT.

The Court erred in refusing to give *each one* of the following instructions requested by defendant and in eliminating portions given, to wit:

“(41) The Court erred in refusing to instruct the jury and in overruling defendant’s motion to give to the jury its proposed instruction as follows:

A deposit consists of the delivery by any person to a bank of money, or its equivalent, for the purpose of having the same retained by said bank, with the duty on the part of the bank to

credit the person so leaving the money, or its equivalent, with said bank. Deposits may be general or special. In case of a general deposit, the moment the money is delivered to the bank it becomes the property of the bank and the relation of debtor and creditor then exists between the bank and the depositor, and the bank is thereupon liable to such person so depositing said money for the value thereof, and the person so depositing the same may withdraw the same in a variety of ways, among which is drawing checks against said deposit, which checks the bank is obliged to pay unless, among other things, it has not sufficient funds to the credit of the drawer of the check to pay the whole check, or said bank has appropriated said money for payment of a debt from the depositor to the bank, or has a lien thereon for overdue indebtedness from the depositor to the bank, and the bank is not obligated in any way to pay orders against said deposit in whatsoever form they may be presented to the net credit balance standing on the books of the bank in favor of said depositor.

(Defendant's exception No. 43.)" (Tr. pp. 236-237).

"(42) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

You are instructed that, if you find from the evidence in this case that the proceeds of the gold dust sold to the bank on the afternoon of 31 July, 1913, were credited to the deposit account of T. Mitchell & Co. at the time of such sale, then the bank had an absolute right to set off the indebtedness of said T. Mitchell & Co. to it against the amount thus deposited, and such setoff could be made immediately upon the ascertaining of the amount of the purchase price of said gold dust and the

crediting of the same to the deposit account of said T. Mitchell & Co., regardless of whether or not said T. Mitchell & Co. were insolvent, or whether or not, at the time of said setoff, the bank had reasonable cause to believe that said T. Mitchell & Co. were insolvent.

(Defendant's exception No. 43.)" (Tr. pp. 237-238.)

"(43) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

The instructions given to you relative to preference and the right of a trustee in bankruptcy to recover a preference must be taken subject to the right of the bank to set off the deposits to the credit of an insolvent person or firm against the overdraft or notes of said bank due to said bank; and, in connection with the right of setoffs, I instruct you that, in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid.

(Defendant's exception No. 43.)" (Tr. p. 238.)

"(44) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

You are instructed that, if at the time of the insolvency of any person, firm, or corporation, said bankrupt has a deposit in a bank and is indebted to the bank for notes or overdrafts, the bank has an absolute right to set off the notes and overdrafts held by it against said account, and if the bank did not do so, it is the duty, under the bankruptcy law, of the referee in bankruptcy to ascertain the state of said account and to strike said balance, and

to set off said notes or overdrafts against said deposit account.

(Defendant's exception No. 43.)" (Tr. pp. 239-240.)

"(45) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

Money which is turned over to an officer of a bank without any request that it be kept separate from the other funds of the bank, and which is entered upon the books as a general deposit, and a certificate of deposit issued for the amount, or an entry thereof made upon the general account of such depositor, if he has an account with said bank, is a general deposit, and is not in any sense a special deposit. A deposit has been further defined as the thing or the sums received from the depositor, and a deposit in a bank is presumed to be a general deposit, in the absence of an agreement to the contrary. The purpose and terms of a deposit may be explicitly stated or the intention of the parties may be inferred from their declarations considered in connection with their conduct and all the circumstances.

(Defendant's exception No. 43.)" (Tr. p. 239.)

"(46) The Court erred in refusing to instruct the jury and in overruling the defendant's motion to give to the jury defendant's proposed instruction as follows:

I instruct you that any delivery of money by a person to a bank, to be placed to his credit, is subject to check within the meaning of said expression, unless received and accepted by said bank as a special deposit in some form, not to be drawn against by check, and the right

to check against said account is not an absolute right, even though said money is deposited subject to check, unless, after the making of said deposit, there is a credit balance in favor of said depositor, after the payment of any overdrafts that said depositor may have had and the charging against said account of any matured or overdue notes held by such bank against said depositor, and his right to draw out a sum of money equal to the amount deposited is limited by the right of the bank to set off its indebtedness against said amount so deposited, as you have been heretofore instructed.

(Defendant's exception No. 43.)" (Tr. pp. 239-240.)

"(47) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

You are instructed that, where a bank holds a depositor's note, it has a right, at any time during the day on which said note falls due, or thereafter, to apply funds in its hands belonging to the maker of such note to the payment thereof, even where nothing will be left to the maker's credit to apply on checks.

(Defendant's exception No. 43.)" (Tr. p. 240.)

"(48) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

I instruct you that the enforcement by a bank of its lien or right of set-off by applying deposits, honestly made in the due course of business and without intent on the part of the depositor to prefer the bank, to the payment of the depositor's overdrafts and his notes in

the bank's favor, as they mature, does not, although within four months of the bankruptcy proceedings against such depositor, constitute a preference forbidden by the National Bankruptcy Act, there being nothing in section 68 of said act which prevents the parties from voluntarily doing before the petition is filed what the section itself requires to be done after the proceedings in bankruptcy are instituted.

(Defendant's exception No. 43.)" (Tr. pp. 240-241.)

"(49) The Court erred in refusing to instruct the jury and in overruling defendant's motion to give to the jury defendant's proposed instruction as follows:

I instruct you that, if you are satisfied from the evidence in this case that the defendant bank made certain loans and permitted certain overdrafts to the firm of T. Mitchell & Co. between their second and third cleanups, upon the promise and agreement on the part of the said T. Mitchell & Co. that they would deliver to said defendant bank the gold dust derived from the next cleanup, to secure or pay said loans and advances, then I instruct you that the transaction should be considered as the taking of security by said bank for a present loan or consideration, and the payment of said loan and advances by the delivery of said gold dust in accordance with the agreement, if you find such agreement was had, is not such a payment as would constitute a preference in the contemplation of the National Bankruptcy Act.

(Defendant's exception No. 43.)" (Tr. pp. 241-242.)

It is respectfully submitted that each one of the foregoing instructions was proper and pertinent in

this case under the issues and evidence, and that they should have been given by the Court to the jury.

XIII.

AMENDMENT TO ANSWER REFUSED.

The Court erred in refusing the following amendment to defendant's answer (Tr. pp. 204-205):

“(54) The Court erred in refusing, subsequent to the rendition of the verdict and prior to the argument for a judgment notwithstanding the verdict, and the motion for a new trial, to permit the defendant to amend paragraph 1 of its answer to plaintiff's amended complaint to conform to the evidence in said cause, by changing the words of the date therein when said setoff was made against said account from ‘1 August, 1913,’ to ‘31 July, 1913,’ and to amend paragraph 4 of its affirmative answer to conform to the evidence, by changing the words ‘1 August, 1913,’ to ‘31 July, 1913,’ and to amend paragraph 5 of its affirmative answer to conform to the evidence, by changing the words ‘1 August, 1913,’ to ‘31 July, 1913’; all on the ground that the evidence introduced showed that the date ‘1 August, 1913’ was erroneously given in said answer when it should have been ‘31 July, 1913.’ (Defendant's exception No. 48.)” (Tr. pp. 204-205.)

It is respectfully submitted, the judgment and orders brought by the writ of error for review by this Court, should be reversed, with instructions to the Court below either to sustain defendant's demurrer to the amended complaint and give judgment thereon for defendant; or to enter a judg-

ment for defendant upon the special verdict, or notwithstanding the verdict.

Dated, San Francisco,

February 14, 1917.

THOMAS A. MCGOWAN,

JOHN A. CLARK,

JOHN KNOX BROWN,

Attorneys for Plaintiff in Error.

CHARLES J. HEGGERTY,

KNIGHT & HEGGERTY,

Of Counsel.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN BANK OF ALASKA, a Corporation,
Plaintiff in Error,

vs.

G. JOHNSON, as Trustee in the Matter of
T. MITCHELL & CO., etc.,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Filed

FEB 23 1917

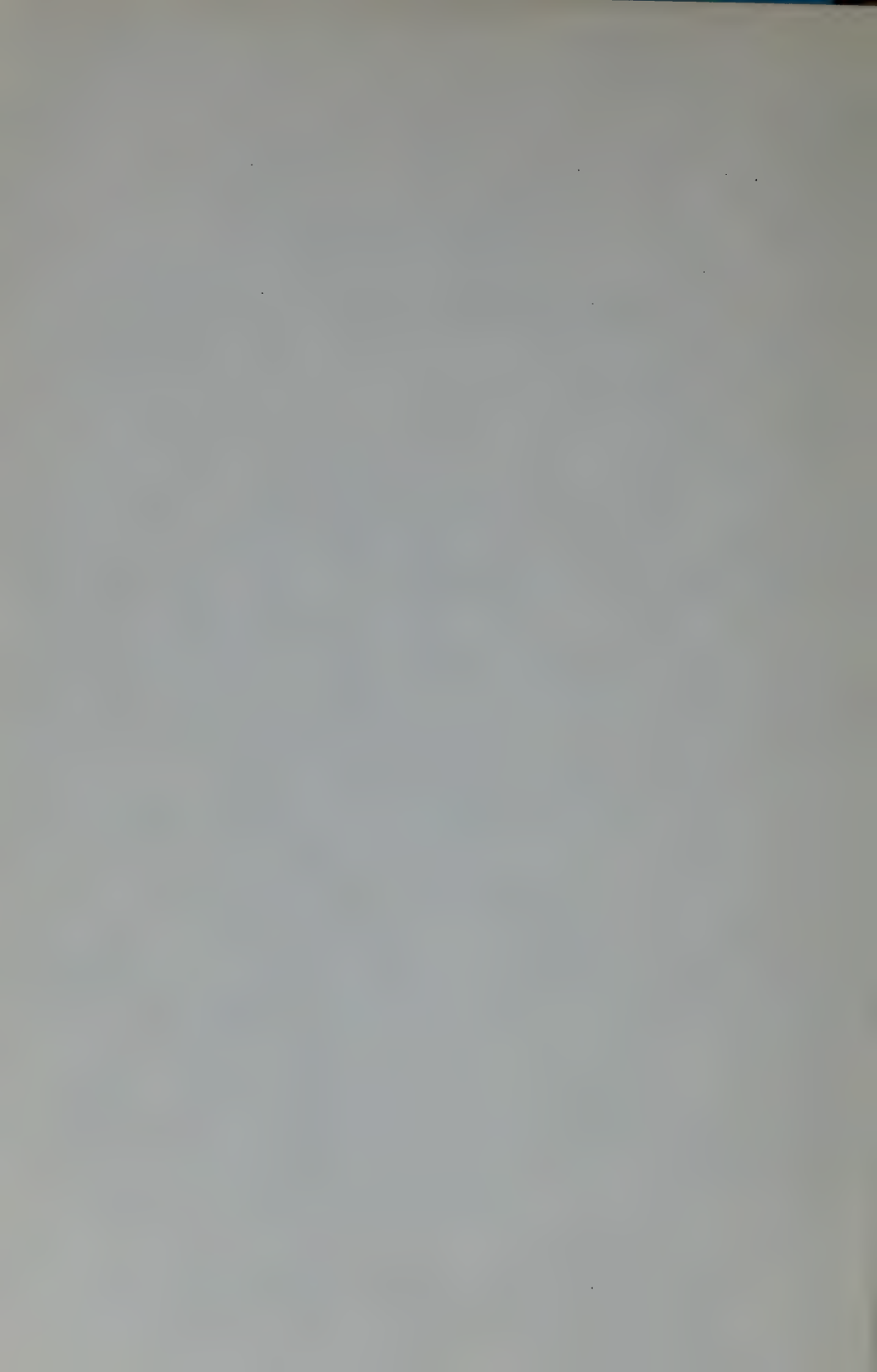
F. D. Monckton,

LOUIS K. PRATT,

Clerk.

THOMAS A. MARQUAM,

Attorneys for Defendant in Error.



*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2815.

THE AMERICAN BANK OF ALASKA,
Plaintiff in Error,

vs.

G. JOHNSON, as Trustee in Bankruptcy in the
Matter of T. MITCHELL & CO., a Mining
Copartnership Consisting of THOMAS MIT-
CHELL, JAMES J. FALLON and HER-
MAN FAWCETT, Bankrupts,
Defendant in Error.

Brief of Defendant in Error.

STATEMENT OF CASE.

No brief on behalf of the plaintiff in error has been served on us, and therefore the best we can do is to state our case and the reasons in law and fact in support of the record as made in the trial court.

The plaintiff below, as trustee for T. Mitchell & Co., a mining copartnership composed of Thomas Mitchell, James J. Fallon and Herman Fawcett, commenced an action in the District Court here to recover from the American Bank of Alaska the proceeds of a sale of gold-dust made by said company to the Bank on the evening of July 31, 1913. The company commenced mining operations about January, 1913, on a placer claim situate on Esther Creek, in the Fairbanks Precinct, Territory of Alaska. James J. Fallon was the business manager of the firm, and as such kept the books and handled the cleanups and

issued checks in payment of labor and other bills in connection with their mining operations. At the start, Fallon had about \$1,500.00 in cash; the other two partners had no property. From the time of commencing operations until the first cleanup in July, 1913, Mr. Fallon borrowed from the Bank some small sums of money, and gave either his own or the firm's notes to evidence the same. The mining company had an arrangement whereby, when cleanups were made, they were to fetch the same to Fairbanks, sell the gold-dust to the Bank, and the proceeds thereof were to be deposited to their account and Mr. Fallon, as business manager for the co-partnership, was to draw checks thereon. The first cleanup, amounting to \$1,904.35, occurred on the 3d day of July, 1913, and the second, amounting to \$2,213.14 was made on the 18th day of July, 1913, and Mr. Fallon issued checks against the proceeds of the sales of gold-dust from the said first two cleanups, which were duly honored and paid. The third or last cleanup was brought in by Mr. Fallon and delivered to the Bank between 5 and 6 o'clock on the evening of July 31, 1913, and was of the value of \$3,750.27, which amount was entered in the firm's pass-book as of the date of July 31, 1913 (Record, p. 22), and in the record of individual deposits as of August 1, 1913 (Record, p. 166). Fallon intended to and did deliver the third or last cleanup on the same terms as the other cleanups had been sold and delivered, and prior to coming to Fairbanks from Esther Creek, relying thereon, had issued checks to the laborers for their wages. Between July 26th and

31st, 1913, conversations over the telephone had taken place between Mr. Fallon and the officers of the Bank, in which they were informed that the mining firm expected that the third cleanup would be of the value of about \$8,000.00. (Record, pp. 56, 57.) When the third or last cleanup was delivered, it was immediately cleaned up and weighed by the gold-dust man, Mr. Paul Hopkins, and the value was ascertained to be \$3,750.27 as above stated. Between 8 and 9 o'clock on the evening of July 31, 1913, a garnishment was served on the Bank in the case of Rutherford & Widman vs. The Copartnership Firm of T. Mitchell & Co., wherein the plaintiffs were seeking to recover the sum of \$410.80, and were endeavoring to reach the proceeds of the sale of gold-dust from said third or last cleanup.

At the time the gold-dust was left at the Bank, on the evening of July 31, 1913, the company owed the sum of \$4,096.04 represented by notes and overchecks or overdrafts that had theretofore been paid for the firm of T. Mitchell & Co.,—\$1,504.00 of which was represented by notes, and the balance was for overdrawn account. The last or third cleanup was weighed up and the value thereof ascertained prior to 6 o'clock on the evening of July 31, 1913, and the Bank *immediately appropriated it* in part payment of the debt of \$4,096.04 then owed to it by the firm of T. Mitchell & Co., and represented by said notes and overdrawn account; it claiming the right to set off the same as against said indebtedness. If this setoff was not actually made prior to 6 o'clock on that

evening, then it was between 8 and 9 o'clock of the same evening and at the time of the service of the garnishment in the Rutherford & Widman case; but in any event, it took place on the evening of July 31, 1913, and was accomplished without consultation with the firm of T. Mitchell & Co., without their consent, and without their knowledge until between 9 and 10 o'clock on the morning of August 1, 1913, at which time Mr. Fallon was informed that the appropriation had been made and that the outstanding checks of the firm would not be honored. When the Bank opened for business on the morning of August 1, 1913, Tony Liongavich, who held a check for \$148.50 issued by the firm of T. Mitchell & Co., presented the same for payment in the usual way but it was dishonored; and none of the outstanding checks of the firm were paid thereafter.

Plaintiff below, as trustee for the creditors of the bankrupt firm of T. Mitchell & Co., brought this action against the Bank on the theory that its purchase of the third or last cleanup on the evening of July 31, 1913, and the appropriation of the proceeds thereof in payment of the firm's indebtedness at a time when it knew and had reasonable cause to believe that the said firm was insolvent, constituted an unlawful preference, and was voidable under Section 60 of the Bankruptcy Act. (For Amended Complaint, see Record pp. 4 to 9.)

The jury found a general verdict in favor of the trustee for the \$3,750.27, and answered three of the five special interrogatories submitted to them, two of the answers covering the question of the Bank's

knowledge of the financial condition of T. Mitchell & Co., upon which judgment was entered for the trustee.

ARGUMENT.

I.

There is no dispute about the facts.

James J. Fallon, the principal witness on behalf of the trustee, testified that he brought the third or last cleanup from Esther Creek to Fairbanks and delivered it at the American Bank of Alaska between 5 and 6 o'clock on the evening of July 31, 1913, and that on the next morning, to wit, August 1, 1913, at about 9:20 o'clock, he was told by Mr. A. Bruning, the cashier that the proceeds of the cleanup had been appropriated by the Bank and setoff against the indebtedness of the firm of T. Mitchell & Co. and that the outstanding checks of that firm would not be honored. Herman Fawcett, another member of the firm, testified that on the evening of July 31, 1913, he called at the Bank and made some inquiries there in reference to whether the proceeds of said third or last cleanup were liable to attachment (he having heard that a man by the name of Nelson, whom the firm owed, was threatening attachment proceedings), and was told by Mr. Bruning that it was not subject to seizure, for the reason that it had been appropriated in payment of the firm's indebtedness. Tony Liongavich testified in regard to presenting the firm's check for \$148.50 at the Bank when it opened for business on the morning of August 1, 1913, and to the fact that payment was refused.

Fallon's testimony commences at page 49 and extends to page 84; Fawcett's from page 99 to page 101, and Liongavich's from page 101 to page 102, of the record.

Mr. A. Bruning, cashier of the Bank, in his evidence commencing at page 146 of the record, states in regard to these significant happenings, among other things the following:

"Q. You're sure the whole thing happened and it was all cleaned up and the amount ascertained before 6 o'clock? A. Yes, sir. Q. And just as soon as you got it ascertained, you set it off against the notes and overdraft? A. As soon as I made out the deposit slip so that I knew how much the cleanup amounted to, I charged up the notes as that slip shows. Q. You made the setoff right then and there? A. Certainly I did. Q. Before 6 o'clock? A. As soon as—(interrupted). Q. (Continuing)—On the evening of July 31, 1913? A. Yes, sir."

And on page 152 of the record:

"Q. Didn't you say a while ago that that setoff was all accomplished prior to 6 o'clock on the evening of July 31, 1913—didn't you so testify? A. I have told you and will tell it again—that we made the credit as soon as the dust was weighed and right after that I charged up the notes. Q. That was before 6 o'clock. A. That was before 6 o'clock. Q. And from that time on you didn't intend to cash any more checks for T. Mitchell & Co.? A. Then you said Mr. Fallon told me he had issued checks for large amounts— Q. You're talking about some-

thing else. A. No, you asked me that. You said that Fallon came in and said he had issued checks for large amounts for the workmen and others, and according to your idea I suppose I should go on cashing them even with a small cleanup. Q. You now want to tell the jury that you didn't make up your mind to make that setoff and not cash any more checks until the attachment was served? A. No; I said I made up my mind not to allow any more overdrafts when that attachment was served. A. Ain't that what I have been talking about? A. I don't know what you're talking about. Q. I tried to get you to tell when it was that you made up your mind that you wouldn't cash any more checks of T. Mitchell & Co.—over-checks? That was 6 o'clock, was it? A. No. Q. When was it? A. I told you after the garnishment. The testimony will show that I was garnished about 8 or 9 o'clock. Q. Then you made up your mind for a certainty that you wouldn't cash any more checks if they were over-checks? A. Certainly. Q. And you knew then that Mitchell & Co. didn't have anything on file? A. I knew they had nothing to their credit. Q. That meant that you weren't going to cash checks at all. A. As long as I wasn't allowing any overdraft. Q. Why wouldn't you cash any more checks for them? A. Because when a house is on fire I'm not going to place insurance. Q. You knew the house was on fire at that time? A. Certainly. When a man jumps another with an attachment it is about time to keep hands off."

From the testimony, on both sides, and especially that of the cashier, Mr. Bruning, it is perfectly apparent that the proceeds of the gold-dust from the third or last cleanup were applied in payment of the past due indebtedness of the firm of T. Mitchell & Co., and were never placed on deposit by the Bank for a moment of time, as a deposit in favor of that company. A deposit, when made in a bank, means that the depositor has left his money thereat subject to his check; and when that is done, the relation of debtor and creditor as between the depositor and the bank immediately arises. But the exact opposite occurred in this case. True, the proceeds of the gold-dust were entered in the pass-book of T. Mitchell & Co. on the evening of July 31, 1913, and in the book containing the business transactions of the following day, August 1, 1913. If that was all the testimony there was on the subject it would have appeared as an ordinary case of deposit subject to check; but that *prima facie* situation was shown not to be the real one by the testimony of Fallon, Fawcett and Liongavich, and demonstrated to be otherwise by the testimony of the cashier, Mr. Bruning.

At the trial the Bank claimed the right to do what it did under Sec. 68 of the Bankruptcy Act in relation to setting off mutual debts; but that position is wholly untenable, for the reason that the amount and value of the gold-dust never became a deposit subject to check, nor, with reference to the sum of \$3,750.27 did the relation of debtor and creditor ever arise as between the Bank and the firm of T. Mitchell & Co. On the contrary, it was treated and ap-

propriated as a payment of the debt of the company due and owing at that time.

It may be argued that an unlawful transfer operating as a preference under Sec. 60 of the Bankruptcy Act involves the idea that the debtor must be an actor, along with the one asserted to have received the preference, before it can be said that the transfer is voidable; but that contention was set at rest by the Supreme Court of the United States in the case of *Wilson Bros. v. Nelson* (183 U. S. 191; S. C., 46 L. Ed. 147, 151), where the following language is used in the opinion:

“The Act of 1898 makes the result obtained by a creditor, and not the specific intent of the debtor, the essential fact.”

Again, in *Mechanic & Metals Bank vs. Ernst et al.*, 231 U. S. 60, S. C., 58 L. Ed. 121, the same doctrine was announced. In that case, the bankrupt firm deposited \$54,048.08, expecting and intending that the same should be placed on the books as a deposit subject to check; but immediately before or immediately after the money reached the bank, the cashier ordered that no more checks of that firm be honored, and thereupon appropriated said sum of money in part payment of an indebtedness due it from the bankrupt. This was held to be a preferential transfer. At the trial in the case at Bar we relied upon the *Ernst* case, and we see no reason why it does not compel an affirmance of the verdict and judgment rendered below.

The circumstance that in this case the appropriation of the money and the notification that it was

not subject to check came after the sale and delivery of the gold-dust can make no difference, because on the next banking day—which was August 1, 1913—the checks of T. Mitchell & Co. were dishonored, for the reason, as the cashier said in his evidence, that company had no credit there—the value of the gold-dust having been applied in payment of their indebtedness to the Bank. The latter by this means got its debt in full, approximately at least, and the laborers and other creditors got nothing.

Mechanic & Metals Bank vs. Ernst et al., 231 U. S. 60; S. C., 58 L. Ed. 121.

Wilson Bros. vs. Nelson, 183 U. S. 191; S. C., 46 L. Ed. 147, 151.

Gabriel vs. Tonner (Cal.), 70 Pac. 1021.

COLLYER ON BANKRUPTCY, pp. 657, 658.

II.

Plaintiff in error will, no doubt, criticise the practice followed in the lower court in the matter of special findings of fact. Five questions or special interrogatories were submitted, three of which were answered and two were not; that is to say, questions numbered 2 and 3 were not answered. Questions numbered 1, 4 and 5 covered the important questions of fact involved in the pleadings and evidence, and were all answered in the affirmative and against the plaintiff in error. The whole case hinged on whether or not the \$3,750.27 was a deposit in the Bank subject to check at the time of the attempted setoff, and the questions were all framed, apparently, with the idea in view of entrapping the jury into

making use of the word "deposit" in connection with the transaction. The witnesses had spoken of the proceeds of the gold-dust as a "deposit" in the sense, however, that the gold-dust had been left in the Bank, and not in the legal sense for which the trustee was contending, "viz.," that the money value thereof was not, in law, a 'deposit,' because it was never subject to check, but, on the contrary, was appropriated immediately by the Bank in payment of its demand against T. Mitchell & Co." So that the use of the word "deposit" in questions 4 and 5 can be reconciled with the general verdict, which finds the allegations of the amended complaint to be true, to wit, "that the Bank purchased the gold-dust, applied the value thereof to the payment of a past due indebtedness of the mining copartnership, and that there was no deposit thereof made which would create the relation of debtor and creditor as to said sum of \$3,750.27." (Record, pp. 6 and 7.)

The Alaska Code provides that the Court may submit special findings, and the Supreme Court of Oregon has held that it is discretionary with the Court as to whether it submits any; and further, having submitted them, and the jury being unable to agree upon the answers, the Court may receive the general verdict without requiring answers to the special findings. The history of the procedure in the matter of special findings will be found at pages 192, 193, 194 and 195 of the Record, from which this Court will see that after the jury had been out for a time, they returned into open court and inquired whether they would be permitted to answer a part only of the ques-

tions in the event they could not agree upon and answer all; that thereupon the Court called the attorneys for both parties to his desk, and it was agreed by all of them that the Judge should orally instruct the jury that they might answer such questions as they could agree upon and omit to answer those about which there was a difference of opinion, which the Court then and there did; that the jury retired and in a short time returned with a general verdict for the trustee and their answers to three of the questions, but with no answers to the remaining two; that upon the reception of the verdict and special findings, no objection whatever was made, and the same were received and filed, and became the basis of the judgment in the case.

It is true that complaint was made of this procedure upon the motion for new trial and otherwise; but if there was any irregularity connected with it, it was waived by the proceedings narrated. This exact question has been before the District Court of Alaska and the holding was as we contend for.

COMPILED LAWS OF ALASKA 1913, sec.
1037.

Rohr vs. Isaacs, 8 Ore. 451.

Swift vs. Mulkey (Ore.), 12 Pac. 76.

Reams vs. McAlpine, 2 Alaska, 165.

Spokane & I. E. Ry. vs. Campbell, 217 Fed. 217;
S. C., 36 Sup. Ct. Rep. 683 (Advance Sheet
No. 16).

Respectfully submitted,
THOMAS A. MARQUAM and
LOUIS K. PRATT,
Attorneys for Defendant in Error.

No. 2815

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE AMERICAN BANK OF ALASKA,

Plaintiff in Error,

VS.

G. JOHNSON, as trustee in bankruptcy in the
matter of T. Mitchell & Co., a mining co-
partnership consisting of Thomas Mitchell,
Jas. J. Fallon and Herman Fawcett,
bankrupts,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

THOMAS A. MCGOWAN,

JOHN A. CLARK,

JOHN KNOX BROWN,

Fairbanks, Alaska,

Attorneys for Plaintiff in Error.

CHARLES J. HEGGERTY,

KNIGHT & HEGGERTY,

Crocker Building, San Francisco,

Of Counsel.

Filed

FEB 27 1917

Filed this.....day of February, 1917.

F. D. Monckton,
Clerk.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2815

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE AMERICAN BANK OF ALASKA,

Plaintiff in Error,

vs.

G. JOHNSON, as trustee in bankruptcy in the
matter of T. Mitchell & Co., a mining co-
partnership consisting of Thomas Mitchell,
Jas. J. Fallon and Herman Fawcett,
bankrupts,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief filed on behalf of the defendant in error, as we view it, practically concedes the case to the bank and substantially the right of the bank to *set off*, as it did, the deposit credit of the value of the gold dust sold to the bank and credited to T. Mitchell & Co. in their general deposit account, and the charging of the overdraft and past due notes against this credit.

The learned counsel open their argument in their reply brief with the statement: "THERE IS NO

DISPUTE ABOUT THE FACTS" (Brief of Defendant in Error, p. 51); with this statement *we agree*; that is the premise of our opening brief.

Their amended complaint (Par. VII, pp. 6-7) expressly alleges the existence with the bank of the general deposit account of T. Mitchell & Co. and *intention* of depositing the proceeds to their deposit account in the bank. Their brief concedes the actual crediting of the deposit to that account and the then charging of the overdraft and past due notes to their account, both in bank book of T. Mitchell & Co. and in the records and books of the bank; all in the usual course of business of the bank and according to the usual course of the previous dealings between T. Mitchell & Co. and the bank (Brief of Defendant in Error, p. 8).

1. That the partnership of "T. Mitchell & Co." had a *general bank deposit and credit account* with the American Bank of Alaska is expressly stated in the amended complaint (Par. VII, p. 6), is expressly alleged in the bank's answer (Par. II, p. 12) and the bank's separate answer and affirmative defense (Par. III, p. 13), admitted by all witnesses and counsel, and proved by the deposit book (Tr. p. 77), and the account itself (Tr. pp. 166a-166b).

2. This account on the evidence of plaintiff's witness *Fallon*, managing partner, was *opened* June 11, 1913, with a deposit of \$200; was *credited* with the *first* cleanup of \$1904 July 3, 1913 (Tr. p. 54); credited with *second* cleanup July 16, 1913

(Tr. p. 56); was credited with the *third* cleanup of \$3750.14 value of gold dust sold to and left with the bank between 5 and 6 o'clock, July 31, 1913 (Tr. p. 59), and "left it to be blown and *credited the same as before* (Tr. p. 63), "with the *intention* of selling the same to the bank and *depositing* the proceeds of such sale in their general deposit account in the bank, having the same *credited* to their deposit account for the purpose of checking against the same" (Amended Complaint, Par. VIII, p. 6).

3. The account on the bank's books in the regular course of its business was charged with *each check as paid* by the bank, with the daily balance or overdraft as it resulted, and on each deposit of the first and second cleanup the bank *credited* the deposit to T. Mitchell & Co. on the books of the bank to the account of T. Mitchell & Co. which account daily showed charged against T. Mitchell & Co. the *checks paid* for T. Mitchell & Co. and balanced their deposit book and returned them their canceled and paid checks (Tr. p. 77, and Tr. pp. 166a and 166b). That was the regular course of business of the bank and was followed in their case always with their acquiescence. *Fallon* testified:

"Q. They didn't treat this *third* cleanup any *different* from what they treated any other deposit in the way it was entered up?

A. *No*. They put it in *just the same as the others*, but instead of acknowledging that they could check against it—to be checked against, I couldn't issue any checks against it,

because it was all taken up on the overdrafts, and the checks that had been issued *during* the cleanup *between the time* of the cleanup" (Tr. p. 74).

Fallon had already testified that the bank, between the time of *this* cleanup, July 16 to July 31, had paid \$3071 for *labor checks* (Tr. p. 67).

The learned counsel in their brief make no attempt to point the Court to any evidence in the record showing:

First. That T. Mitchell & Co. were insolvent as insolvency is defined in section 1, of the Bankruptcy Act of 1898, thus:

"A person shall be deemed insolvent within the provisions of this Act whenever *the aggregate* of his property, exclusive of any property which he may have conveyed, *transferred*, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a *fair* valuation, be sufficient in amount to pay his debts";

and this change in the Act of 1898,

"greatly increased the burden on the trustee in cases of this character";

and this means on July 31, 1913, *not* August 23, 1913, when the petition was filed.

Morton, District Judge, in *Clifford v. Morrill*, 230 Fed. 190, decision quoted pp. 85 and 86, of our opening brief.

There is not any evidence showing *what* property T. Mitchell & Co. owned on July 31, 1913, when the

deposit was made with the bank, or what was its *fair* value; and yet the record does show that they then had their valuable lease on a mining claim growing richer with each cleanup; the first was \$1904, the second \$2213.14, and the third, here involved, \$3750.27; although there was no evidence to show what the fair or any value of this lease was; Mr. Bruning testified that they spent \$10,000 about opening up their mining ground, and that was generally considered an asset (Tr. p. 122); and their schedules, filed September 26, 1913, showed they then had other real estate and personal property valued at \$3286 (Tr. p. 38), nothing appearing about their mining lease.

Second. The learned counsel make no attempt whatever to show that on July 31, 1913, or any time previous to the filing of their petition on August 23, 1913, that the bank or Mr. Bruning, its cashier, knew or even had any cause to believe that T. Mitchell & Co. were insolvent. Mr. Fallon testified that the bank *paid* \$3071 of their *labor* checks and \$1800 between July 16 and July 31, 1913 (Tr. pp. 67, 69 and 60); and it is not very likely the bank would have done that if the bank had any suspicion even, let alone reasonable cause to believe, they were insolvent. Mr. Bruning testified he had no knowledge or information of any nature or description or any reason to believe they were insolvent, and that he would not have permitted their overdraft if he had (Tr. pp. 117-122). There is not a syllable of evidence in the record

that the bank or Mr. Bruning knew on July 31, 1913, what property T. Mitchell & Co. owned, or what they owed or what creditors they had or what debts they owed or that they were indebted to anyone in any amount whatever. Mr. Fallon testified in answer to plaintiff's counsel, that there was no intimation on his part to Mr. Bruning as to the amount of checks outstanding for labor (Tr. pp. 83-84), and the same on cross-examination by the bank's counsel (Tr. p. 80), and that their ground was looking better all the time and that they had no intention of quitting work, that the ground was blocked out, everything was in working shape, men were at work and were continuing work, and that he told Mr. Bruning on August 1st that the ground was looking very good and they were going ahead (Tr. pp. 78-79). The garnishment was served on the bank between 8 and 9 o'clock that night, July 31st. Mr. Bruning so testifies (Tr. p. 153), and it was *only after* the garnishment was served that he decided not to allow any more *overdrafts* (Tr. p. 153); Mr. Pratt, testifying for plaintiff corroborates Mr. Bruning that the garnishment was served about 8:30 or 9 o'clock, and also that after that he called Bruning up to know what the garnishment caught, and Bruning told him that the bank had credited the cleanup, and they still owed the bank (Tr. pp. 103-104); and the learned counsel in their brief state that the garnishment was served between 8 and 9 o'clock for \$410.80 (Brief of Defendant in Error, pp. 3, 4).

Third. The learned counsel make no attempt to point out to the Court anything in the record showing that the bank or Mr. Bruning acting for it on July 31, 1913, or at any time, knew or believed or had reasonable cause to believe that in receiving said deposit or in offsetting the overdraft and notes, they were receiving or effecting a preference or receiving a larger percentage of its indebtedness than any other creditor of the same class or any class.

In truth, and we are justified in saying that the learned counsel concede by failing to assert in their brief or make any attempt to point out to the Court any evidence to the contrary in the record, that the bank did not nor did Mr. Bruning, acting on July 31, 1913, for the bank, know or have any reason to believe that T. Mitchell & Co. were insolvent, or that the bank intended to effect a preference of itself, or believed or had any reason to believe that it was effecting a preference whereby it would receive a greater percentage of its indebtedness than any other creditor of the same class.

The learned counsel for defendant in error in their brief place their whole case upon the authority of the decision of the Supreme Court in *Mechanics & Metals Nat. Bk. of N. Y. v. Ernst*, 231 U. S. 60, 66, 58 L. Ed. 121, 124, where a deposit of \$54,048.08 had been made after knowledge of insolvency, but the learned counsel *inadvertently state* in their brief, page 9, that,

“* * * immediately before OR immediately AFTER the money reached the bank, the cashier ordered that no more checks of that firm *be honored*, and thereupon appropriated the said sum of money *in part payment* of an indebtedness due it from the bankrupt” (Brief of Defendant in Error, p. 9),

the fact being that the deposit was made *after* such order of the cashier.

Therefore we quote *that* case of *Ernst* and its companion case of *Hotchkiss* (231 U. S. 50, 56, 58 L. Ed. 115, 119).

In the Ernst case the Court said:

“This is an appeal from a decree of the Circuit Court of Appeals, reached upon the same opinion that disposed of *National City Bank v. Hotchkiss*, just decided (231 U. S. 50, ante, 115, 34 Sup. Ct. Rep. 20).

“(The judgment of the District Court will be found in 200 Fed. 295.) *This case* arose at the *same* time and *differs but little* from that in its facts, as to which, as in the other case, the master, the District Court, and the Circuit Court of Appeals all agree.

“The advance in this case was made at about 10 on the following note, to the firm signing it, ‘Please loan us today \$400,000. Crediting this amount to our account, and oblige. J. M. Fiske & Company.’ This sum was credited on the firm’s deposit account, on which there was already \$36,239.47. Before noon the bank certified and afterwards paid checks for \$276,-679.67. Between 11 and 12 the *cashier*, *hearing that there was trouble* in the stock market and *with J. M. Fiske & Company*, *ordered that no more checks should be paid or certified*. He then *went* to the brokers’ office, saw Mr. Sherwood, a member of the firm, at about 12, and

after getting an *evasive answer* to an inquiry *as to the rumor*, said that the firm had made no deposits on that day, and was told that one was on its way. (*\$54,048.08 were in fact paid in after the cashier's order to stop payment.*) He then told Mr. Sherwood that he had better give him some securities, that he ought to give additional securities on the bank's loans, and after consultation Mr. Sherwood did so, and the cashier returned to the bank. We may assume for purposes of decision that the securities, with a small exception, were obtained by the use of the clearance loan.

"At 40 minutes after 12 the brokers gave notice to the stock exchange that they were unable to meet their obligations, and an involuntary petition in bankruptcy was filed against them at 25 minutes past 3. This suit is for the proceeds of the securities (which were sold by the bank), *and for the sum deposited as we have stated.* In view of our decisions in the other case, only one or two matters need mention. It is somewhat more pressed that the bank had not reasonable ground to believe that the brokers' property at a fair valuation would be insufficient to pay their debts, and therefore had not ground to believe that the brokers were insolvent within the meaning of the bankruptcy act, Sec. 1 (15). We think it too plain to need argument that the findings below that the firm was insolvent, knew that it was insolvent, and intended a preference, were correct. These brokers were ruined by the collapse of the pool mentioned in the other case, and apart from any knowledge that the bank may have had as to their interest in the stock concerned, the entirely unusual course of the cashier in leaving his bank to get additional security (not merely proceeds of the clearance loan upon a claim of lien) and the circumstances are sufficient

to prevent our going behind the finding below. Really no other conclusion could have been reached."

In the Hotchkiss case, 229 U. S. 50, *companion* to the Ernst case, similar *preferences* were received in the way of securities, *after* similar knowledge with the bank officers, and while the trustee claimed the deposits and securities made and given by the bank *after* such knowledge were preferences and the Courts all so hold, and *no one*, either trustee, creditor or Court, questioned the deposits made on the *same day*, some few hours *before* the bank obtained that knowledge; and the Supreme Court, relating to such deposits made *before*, said (Tr. pp. 55-56):

"During the day the firm made *deposits* which are *not* in question, but there remained due upon the loan \$166,166.69. Officers of the bank, noticing the drop in the stock, went to the firm, *demanding payment* or securities to make good the obligations to the bank, *and were told of the suspension* and that a petition *in bankruptcy* would be filed. After two hours' discussion the *securities* in question were delivered between 2 and 3 p. m., but the officers were *told* that the delivery was *a preference*";

and the petition in bankruptcy was filed about 4 p. m. of the same day (Tr. p. 55).

In the case before your honors, this deposit and credit to the general deposit account of T. Mitchell & Co. and the offset had been made *before* 6 p. m. (Tr. p. 153); the garnishment for \$410 was not levied until between 8:30 and 9 p. m. (Tr. pp.

103-104); the petition in bankruptcy was *not* filed until August 23, 1913 (Tr. p. 25); and there is not a particle of evidence that the bank or Mr. Bruning knew anything at all about the financial condition of T. Mitchell & Co. except with the bank, or that they were insolvent or that this deposit would effect a preference or a greater percentage of their indebtedness than any other creditor of the same or any class, or that the bank intended a preference, or that there was any suspicion of fraud or collusion.

In *Studley v. Boylston National Bank*, 229 U. S. 523, 57 L. ed. 1313, referring to *New York County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380, the Supreme Court, by Justice Lamar, said:

“An effort is made to distinguish that case from this, by calling attention to the fact that here, by checks drawn on the account or notes charged to the account, the parties themselves voluntarily made the setoff before the petition was filed; while in the *Massey* case the trustee, under the supervision of the referee, stated an account and allowed the setoff as permitted by 68a, which provides ‘that in all cases of mutual debt, or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid’.

“That section did not create the right of setoff, but recognized its existence, and provided a method by which it could be enforced even after bankruptcy. What the old books called a right of stoppage—what business men call setoff—is a right given or recognized by the commercial law of each of the states, and

is protected by the bankruptcy act if the petition is filed before the parties have themselves given checks, charged notes, made book entries, or stated an account whereby the smaller obligation is applied on the larger.

“The banker’s lien on deposits, the right of retention and setoff of mutual debts, are frequently spoken of as though they were synonymous, while in strictness, a setoff is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men in making book entries whereby one mutual debt is applied against another. If the parties have not voluntarily made the entries, and suit is brought by one against the other, the defendant, to avoid a circuitry of action, may interpose his mutual claim by way of defense, and if it exceeds that of the plaintiff, may recover for the difference. Such counterclaim can be asserted as a defense or by the voluntary act of the parties, because it is grounded on the absurdity of making A pay B when B owes A. If this setoff of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the trustee. But there is nothing in 68a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted.

“The bank was indebted to the Collver Company as a depositor some \$54,000 for money deposited in good faith in the usual course of business, and with no purpose of enabling

the bank to secure the right of setoff. The Collver Company, on the other hand, was indebted to the bank \$25,000 on notes maturing at various dates. These were mutual debts, and if, on the date the first note became due, the Collver Company had failed to pay it, the bank could have enforced its banker's lien or its right of setoff, by applying \$5000 of the deposits in payment of the note which matured that day, and so on as each of the other notes became due. It cannot have been illegal for the parties on September 12, 20, 30, October 3 and 14, to do what the law would have required the trustee to do in stating the account after the petition was filed on December 16, 1910. No money passed in either instance; for, whether the checks for \$5000 were paid or notes for \$5000 was charged was, in either event, a book entry equivalent to the voluntary exercise by the parties of the right of setoff.

The bankruptcy act recognizes this right, and it cannot be taken away by construction because of the possibility that it may be abused. The remedy against that evil is found in the fact that the trustee is authorized to sue and recover *if it is shown that after insolvency the money was deposited for the purpose of enabling a bank or other creditor to secure a preference.* But to deny the right of setoff in cases like this, would in many cases make banks hesitate to honor checks given to third persons, would precipitate bankruptcy, and so interfere with the course of business as to produce evils of serious and far-reaching consequence."

In *Lowell v. International Trust Co.*, 158 Fed. 781, 783, 784, the Circuit Court of Appeals for the First Circuit, where a voidable preference by payment, was asserted, the Court held:

“The plaintiff also urges on us that in *New York Bank v. Massey*, the bank took no action formally or otherwise, but merely left it to the law to offset the deposit made by the bankrupt against his indebtedness, while in the case at bar we must accept the statement that the defendant charged up its demand loans against the deposit, or in other words, went through the formalities of certain alleged journal entries. This, however, was ineffectual either way, whether to benefit or prejudice the International Trust Company. It only gave expression to what the law itself would accomplish, that is, it cleaned up the setoff and left it where the law itself would have left it. At law, it takes two parties to accomplish an effectual payment, both a payor and a payee. Sometimes, of course, the law appropriates moneys in payment, or permits the creditor to do it; but that is in consequence of some express or implied understanding between the parties. In such instances an intention on the part of both parties to make payment on some indebtedness underlies what the law accomplishes, and the law is called in only because, while payment is intended, the particular item of indebtedness to which it shall be appropriated is not specifically pointed out. In no sense, however, is a deposit like the deposit here payment, or intended as payment. This is the first condition of the decision in *New York Bank v. Massey* and a vital one; because if a deposit in the usual course of business may be in the nature of a payment, an unlawful preference would necessarily be involved under the circumstances of either *New York Bank v. Massey* or the case at bar, a suggestion of a possibility which the Supreme Court was compelled to negative.

“What the International Trust Company did in the case at bar more than what was done in

New York Bank v. Massey was, as we have said, simply to give form to what the law itself accomplished in substance. Moreover, *if what was done by the International Trust Company* in distinction from what was done by the creditor in New York Bank v. Massey, *accomplished a preference, and for that reason was invalid or had been invalidated, the condition prior to the charging up the demand loans would have been restored by force of law, and the deposit would remain with the International Trust Company, precisely as it did in the case before the Supreme Court,* and also the law would be left to operate in precisely the same manner. All this, therefore, raises *no substantial difference* which we can discover to relieve us from the conclusions of the Supreme Court in the case on which the International Trust Company relies.

“In addition to the above, we refer to the decision of the Circuit Court of Appeals in the Seventh Circuit in *Re George M. Hill Co.*, 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68. This case was decided only a few months after *New York Bank v. Massey*, and at page 318 of 130 Fed., at page 564, of 64 C. C. A. (66 L. R. A. 68), it was rested thereon. In that case it appears, at page 316 of 130 Fed., at page 563 of 64 C. C. A. (66 L. R. A. 68), that two days before the filing of the petition in bankruptcy the creditor bank appropriated the balance of the deposit account precisely as was done in the case before us. No distinction was made by the Circuit Court of Appeals on that account. It is true that the attention of the court does not seem to have been specifically called thereto; but the facts indicate that none of the parties to that litigation perceived any distinction on account thereof.”

It is respectfully submitted the judgment brought to this Court by writ of error should be reversed, with directions to the District Court as requested in the conclusion of our opening brief.

Dated, San Francisco,
February 27, 1917.

THOMAS A. MCGOWAN,
JOHN A. CLARK,
JOHN KNOX BROWN,

Attorneys for Plaintiff in Error.

CHARLES J. HEGGERTY,
KNIGHT & HEGGERTY,
Of Counsel.

5

United States
Circuit Court of Appeals
For the Ninth Circuit

PETER GEDDES, JOSEPH R. WALKER, JOSEPH S. BAER, HENRY S. EVERETT, MARGARET ANN MEEHAN, EUGENE BLUM, ISAAC BLUM, EDWARD BLUM, ISADOR BAER, ALPHONS DREYFOOS; and ALPHONS DREYFOOS, EUGENE BLUM, DAVID C. GOLDENBERG, and EUGENE BASCHO, Copartners, Doing Business Under the Firm Name and Style of DREYFOOS, BLUM & COMPANY; LEOPOLD FREUND and ALICE FREY,

Appellants,

vs.

ANACONDA COPPER MINING COMPANY, a Corporation, ALICE GOLD AND SILVER MINING COMPANY, a Corporation, and JOHN D. RYAN, J. W. ALLEN, W. D. THORNTON, A. C. CARSON, and E. S. FERRY,

Appellees.

BRIEF OF APPELLEES

L. O. EVANS,
W. B. RODGERS,
D. GAY STIVERS,

Solicitors for Appellees **F. D. Monckton,**
Clerk.

Filed

MAR 5 - 1917

United States
Circuit Court of Appeals
For the Ninth Circuit

PETER GEDDES, JOSEPH R. WALKER, JOSEPH S. BAER, HENRY S. EVERETT, MARGARET ANN MEEHAN, EUGENE BLUM, ISAAC BLUM, EDWARD BLUM, ISADOR BAER, ALPHONS DREYFOOS; and ALPHONS DREYFOOS, EUGENE BLUM, DAVID C. GOLDBERG, and EUGENE BASCHO, Copartners, Doing Business Under the Firm Name and Style of DREYFOOS, BLUM & COMPANY; LEOPOLD FREUND and ALICE FREY,

Appellants,

vs.

ANACONDA COPPER MINING COMPANY, a Corporation, ALICE GOLD AND SILVER MINING COMPANY, a Corporation, and JOHN D. RYAN, J. W. ALLEN, W. D. THORNTON, A. C. CARSON, and E. S. FERRY,

Appellees.

BRIEF OF APPELLEES

I.

STATEMENT OF THE CASE.

In view of the contentions herein to be presented, it is necessary that a statement, additional to that made in the brief of Appellants, should be made, and we shall attempt to make the same as concisely as possible.

CORPORATE PROCEEDINGS OF ALICE COMPANY TOUCHING SALE OF ITS PROPERTIES TO ANACONDA COPPER MINING COMPANY, AND ATTEMPTED DISSOLUTION OF ALICE COMPANY.

That prior to the meeting of stockholders herein mentioned, the proper officers of the Anaconda Copper Mining Company and the Alice Gold and Silver Mining Company, pursuant to authority vested in them by the respective Boards of Directors of said Companies, entered into a contract and agreement whereby, subject to the approval of the stockholders of the Alice Company, said Alice Company was to convey to the Anaconda Company, for a consideration of thirty thousand shares of the capital stock of said Anaconda Company and other incidental considerations, all the property of said Alice Company.

Thereupon, by order of the Board of Directors of the Alice Company, a stockholders' meeting of said Company was duly and regularly called and noticed, to be held at the principal office of the Company, in Salt Lake City, Utah, on the 27th day of May, 1910, for the purpose of considering the proposition of confirming and ratifying said contract of sale. This meeting was in all respects regular, and all of the stockholders of the Company had due notice thereof. Stock of the Company aggregating 295,100 shares, out of a total outstanding issued stock of 400,000 shares, was represented

at said meeting, either in person or by proxy. Thereupon, the contract heretofore referred to was submitted to said meeting of stockholders, and was duly ratified and confirmed by a vote of 289,500 shares for, and a vote of 5,510 shares against, said dissenting stockholders being among those represented as Appellants in this case. (See Tp., Vol. I, pages 317-347.)

In pursuance to express authorization by the Board of Directors of the Alice Company, so ratified and confirmed by more than two-thirds of the outstanding capital stock of the Alice Company, on the first day of June following, the Alice Company, by John D. Ryan, its President, duly executed a deed of conveyance, conveying all of the Alice Company's property to the Anaconda Company.

At the time of these transactions, it was the intention of the Board of Directors of the Alice Company to dissolve said Company and distribute its assets to the stockholders. Upon this point Mr. C. F. Kelley testified as follows:

“The plan from the inception of the general idea of consolidation was to sell the properties of the Alice Company to the Anaconda Company and at or prior to this meeting a meeting of the stockholders of the Alice Company was called, in the event that the stockholders should ratify the sale by the directors and the properties be conveyed, that there should be a dissolution of the Alice Gold and Silver Mining Company,—as a matter of fact, I think that prior to that time, the time of the Alice directorate meeting, we had represented to the

New York Stock Exchange as a condition to the listing of the stock, that these subsidiary companies, whose holdings would consist of nothing but Anaconda stock, would be dissolved in order to eliminate any objection that the Stock Exchange might have to double subsidiary companies, or holding companies within holding companies. *I know that was the purpose of the officers and directors of the Alice Company at and prior to the meeting calling this stockholders' meeting.*" (Tr., Vol. II, pages 853-854).

Pursuant to this general plan, the Board of Directors of the Alice Company, by resolution, called a meeting of the stockholders of said Company, to meet on the 8th day of May, 1911, for the purpose of considering a proposition to dissolve said corporation and to wind up and terminate its existence. This meeting was duly noticed and was in all respects regular. 310,963 shares of the Alice Company were represented thereat. By a vote of 297,088 shares to 13,385 shares, it was resolved that the Alice Gold and Silver Mining Company should take all necessary steps and do all things necessary and proper under the laws of the State of Utah to secure the dissolution of this corporation and to cause a proper distribution to be made to the stockholders entitled of all of the assets and property of said corporation. (Tr. Vol. I, pages 347-365).

Those who dissented are the Appellants in this suit.

The bill of complaint herein was filed on the 6th day of November, 1911, almost eighteen months after the stockholders had approved and ratified the transaction.

II.

RELATIONS EXISTING BETWEEN THE ALICE COMPANY AND ANACONDA COMPANY AT TIME OF THE TRANSFER.

At the time of the transaction complained of, the Anaconda Company exercised no controlling influence over the affairs of the Alice Company, further than the fact that John D. Ryan was a director of the Alice Company and its President, and also a director of the Anaconda Company.

The Board of Directors of the Alice Company consisted of five members, none of whom, save Ryan, had any voice in the affairs of the Anaconda Company.

It is true that the Butte Coalition Company, a holding company organized for the purpose of holding the stock of the Red Metals Mining Company and such other stocks of mining companies as it might purchase, was the owner of a majority of the stock of the Alice Company. Said Butte Coalition Company had a capitalization of One Million shares of the par value of Fifteen Dollars per share. Neither the Anaconda nor Amalgamated Company exercised any right of control over either the Red Metals Mining Company or the Butte Coalition Company. These companies were entirely separate, independent and distinct from either Anaconda or Amalgamated. They were neither organized nor controlled, through directorates or stock ownership, by either of said Companies.

These properties were known as the Cole-Ryan Companies, the controlling spirit in which was one Thomas F. Cole and his associates; and neither the said Cole nor his associates have ever had any voice in the management of either Anaconda or Amalgamated.

Out of the One Million shares of Butte Coalition, Anaconda owned none and Amalgamated only Fifty Thousand.

Mr. John G. Morony says:

"The organization of the Butte Coalition Company was absolutely separate and distinct from the Amalgamated Copper Company, and as a matter of fact, the Amalgamated Company had absolutely nothing to do with the Butte Coalition Company at the time of its organization, and as far as I know the Amalgamated Copper Company has had absolutely nothing to do with the Butte Coalition Company since its organization." (See Transcript, Vol. I, page 280).

Mr. John D. Ryan says:

"There was no one directly associated in the negotiations with Heinze who had any connection with the Amalgamated Copper Company but myself and attorneys who were acting for me. These negotiations were all with Mr. F. Augustus Heinze. I did not feel that I was representing the Amalgamated Copper Company in these negotiations. I had no authority from the Amalgamated Copper Company to proceed with the negotiations, and as a matter of fact was never acting for the Amalgamated or its interests except insofar as the dismissal of the litigation would prove to be to its interests, and I was trying to bring that about as a part of the trade." (See Tp., Vol. I, pages 382-383).

The titles to the Heinze properties passed to Thomas F. Cole, and from Thomas F. Cole were transferred to the Red Metals Company. Ten and one-half million dollars was paid in cash for the Heinze properties. There was not any difficulty in raising the money. The stock was largely over-subscribed. The transfer was made to Cole and from Cole to the Red Metals Mining Company, and then the Butte Coalition Company was organized and it became the holder of the stock of the Red Metals Mining Company. (See Tp., Vol. I, pp. 382-384).

In 1905 Mr. Ryan obtained an option on a majority of the stock of the Alice Company, as a personal transaction of his own, and later, upon the organization of the Butte Coalition Company, this option was transferred to it and the stock acquired.

All other matters, save the fact that Mr. Ryan was a common director of the two Companies, are wholly unimportant as tending to show control of the Alice Company by either Anaconda or Amalgamated.

It is immaterial through what channel those who held the proxies to vote Alice stock at meeting of the Alice Company received instructions as to how to vote upon the question of sale of Alice properties. The proxies were sent out by the Secretary of the Alice Company. They were accompanied by a circular from the management advising each stockholder that in the opinion of the management the agreement of the Com-

pany, entered into by authority of its Board of Directors with the Anaconda Company, ought to be ratified and was advantageous to Alice stockholders. In response to this circular letter, the stockholders voting for the confirmation of the trade signed the proxies authorizing the persons named to vote their stock at this meeting and returned them either directly to these persons or to the Secretary of the Company who had transmitted the blank proxies and the circular letter. Under these circumstances this constituted a direction of the principals to their agents to vote the stock in favor of the proposition equally as much as though each stockholder had given a special direction to vote the stock in this manner. The result was that the persons named in the proxies, or their substitutes, voted this stock directly in accordance with the wishes of the stockholders, and no stockholder has ever disaffirmed the conduct of those who acted for him. In other words, the authority to vote the stock in favor of ratifying the sale of Alice properties to the Anaconda Company came directly from the stockholders themselves, and the particular channel through which this information was conveyed to those whose duty it became to vote the stock is entirely immaterial. It is also immaterial that Mr. Kelley, Chief Counsel for the Anaconda Company, was one of the proxy holders, or that Mr. D. Gay Stivers, another one of the counsel, actually attended the meeting, for the reason that it does not appear in any way that either Mr. Kelley or Mr. Stivers gave any advice

to the stockholders of the Company as to whether the sale should be either ratified or rejected.

Of equally small consequence is it that Butte Coalition, in which neither Amalgamated nor Anaconda had a controlling voice, had an office in the same building with the Alice Company, in the City of New York, or that Ryan and Cole were friends, or that matters in controversy were settled amicably between the Red Metals Company and the Anaconda Company, or that the attorneys for the Anaconda Company became the attorneys for the Red Metals Company, or that Mr. Gillie, General Superintendent of Anaconda mines, became the custodian of the Alice, or that Mr. Alley sometimes signed the checks of the Alice and had an office in the same building with Counsel for the Anaconda Copper Mining Company.

None of these things had an influence, so far as the testimony discloses, or any effect whatever, upon the final action of the stockholders of the Alice Company in ratifying the sale of the Alice properties to the Anaconda Company, and none of these persons gave any advice whatever to any stockholder of the Alice Company as to the propriety or advisability of the sale of Alice properties to the Anaconda Company from a business standpoint.

The fact that Mr. Ryan being a director of the Alice Company, was also its President, is of no concern. It does not appear that as President Mr. Ryan had, either

under the by-laws of the Alice Company or the laws of the State of Utah, any extraordinary powers. As President, he was undoubtedly only an executive officer. It was his duty only to execute the will of the Board of Directors as expressed in corporate action, such Board of Directors being the governing body of the corporation. Therefore, the question of unity of control or influence of the Anaconda Company over the conduct of the Alice Company resolves itself into the sole question, insofar as it affects this sale, of there being one common director of Anaconda and Alice.

III.

VALUE OF ALICE PROPERTY IN THE YEAR OF 1910.

That the market value of the Alice property in the year 1910, if indeed it had any market value whatever, was far below what was paid for it by the Anaconda Company, and far below what any one, save the Anaconda Company, with its facilities for cheap development of the property, could or would have paid, is indisputable; and that the price paid by the Anaconda Company was fair, full and adequate, is apparent from a moment's attention to the history of the Alice, the condition of the Alice Company and the metallurgical possibilities of the property. This property appears to have been acquired about the year 1876, and the Company was incorporated in the year 1880. It contained silver ores, much of which carried large quanti-

ties of zinc. For some years it was operated profitably, yielding altogether dividends to its stockholders in the amount of \$1,075,000. As its development progressed the ores became much leaner in metal contents, and also much more difficult to treat, on account of the presence of refractory elements, increasing the cost of reducing and treating the same. Increased depths added to the cost of mining and handling, and coincident to the increase of the mining and reduction costs, and lessening of value, the price of silver, the one valuable constituent of the ore, decreased very rapidly, so that about the year 1893 profitable mining operations upon the property ceased, and the property which had been developed to a depth of fifteen hundred feet, and which contained over ten miles of underground workings (Tr., Vol. II, page 935), was allowed to fill with water up to the seven or eight hundred foot level. Thereafter, a system of leasing was carried on at the property, resulting, after the year 1898, in a constant loss, from over \$20,-320.80, the greatest, in the year 1902, to \$1156.00 in the year 1911. During the same time the market value of its stock declined from approximately Three Dollars a share during the early periods of its operation, to a merely nominal sum, and for a period of ten years preceding the acquisition of a majority of the capital stock by the Butte Coalition Company in 1906, the only recorded sale during that time was at the price of twelve and one-half cents per share.

In addition to showing a yearly loss, at the time of

the sale to the Anaconda Company in 1910 the Company had an outstanding indebtedness of about Thirty-four Thousand Dollars, and had no funds whatever with which to meet the same. There were no ores in the mine of known value; although developed to a depth of fifteen hundred feet, and with ten miles of underground workings, these workings were caved and dilapidated; mill and hoist had burned; and except for bodies of zinc-bearing refractory ores of no known value, the entire asset of the Company was represented by this worked-out and dilapidated mining property.

No process was then or is now known by which the zinc ores, or any other ores, known to exist in the mine could be profitably mined and treated. Whether such a process would ever be found was and still is wholly problematical, for notwithstanding great progress in the treatment of zinc ores in the Butte Camp has been made in recent years, the Alice ores, being entirely different and quite more refractory than other zinc ores in the Butte Camp, have not yet been successfully subjected to treatment. To develop such a process, if indeed the same could be developed at all, would require enormous sums of money, such expenditures to be made subject to ultimate failure.

To open up the mine and equip it for prospecting and development work would have required an expenditure in excess of Two Hundred Thousand Dollars; to work the mine and treat the ores would have required a much

larger expenditure, the testimony showing that to build a mill of only five hundred tons capacity would cost approximately Five Hundred Thousand Dollars (See Tr., Vol. II, pages 938-939).

There was no feasible method by which funds could be raised to further exploit and develop the property or discharge its indebtedness. The Company had nothing to offer upon which any reasonably prudent individual would have advanced these sums of money. (See Tr., Vol. I, pages 397-400).

The property had been thoroughly examined by skilled representatives of two of the largest zinc companies in the United States, the Empire Zinc Company and Beer-Sondheimer & Company, and after such examination the properties were offered to such companies on lease, but the zinc operators declined to have anything to do with them.

Judging from Appellants' statement of facts, touching value of Alice property, beginning on page 17 of their brief, it would appear that the sole reliance of Appellants to sustain the conclusion of the Court, that the price paid for Alice of \$1,500,000 and assumption of Alice's debts, was inadequate, is that Alice ground contains copper of commercial value, and in an amount and so readily accessible that from its proceeds a purchaser could recoup a purchase price in excess of that amount and all expenditures for the recovery of the same.

The record discloses that such a contingency is, if anything, no more than a bare possibility, and wholly insufficient as a basis for an estimate of greater value of the property.

Alice is located in the silver zone of the Butte District. Notwithstanding ten miles of underground workings, no commercial copper has ever been found therein, neither has any ever been found in reasonable proximity to this ground. If any copper is to be found therein it must be in certain veins, some of which tend towards the Alice ground, which, so far as explored outside of the limits of the same, bear copper ores only in pockets, and in their progress towards the Alice ground become either barren or change the character of the mineral contents from copper to silver or zinc.

The record is so barren of any evidence which would lead a reasonably prudent mining investor to entertain a well-founded hope that commercial copper exists in Alice ground that counsel are, and the Court must be, surprised at the contention of Appellants.

Mr. Goodale, a metallurgist of repute, connected with the Anaconda Copper Mining Company or some of its subsidiaries since 1898, both in its smelting department and as Assistant Manager of the Company, and entirely familiar with the entire mining district of Butte, testified as follows:

“To my knowledge there has never been discovered a vein of copper of any kind or character in any of the Alice properties. I will say in that

connection, that I looked at the report of Professor Blake to see if he mentioned occurrences of copper there in 1898, and he did not." (See Tr., Vol. I, page 299).

Again:

"I spoke about Professor Blake's report on the copper district of Butte. He examined the Alice mine somewhere about 1885 and there is a paper he published on the silver mining in Butte. That, I think, was in 1887. Silver was the chief product of the Butte camp in 1885. I am inclined to think that by that time copper was over-balancing the silver in value of product." (See Tp., Vol. I, page 305).

Mr. Buzzo, Acting Superintendent of the Alice property from November, 1906, speaks of the Alice as containing a large body of lead and zinc ores. (See Tp., Vol. I, page 375). And in reply to a question as to copper in the vicinity of the Alice said:

"No, there is no ground near there that is worked for copper that I know of." (See Tr., Vol. I, page 378).

Mr. Ryan said:

"The Alice properties are far to the northwest and outside of any territory that has ever produced copper in paying quantities." (See Tr., Vol. I, page 392).

Again:

"The mine has been worked to a depth of about fifteen hundred feet, and even with silver above a dollar an ounce, had closed down. No one had ever been able to find a process that would make the zinc ore in the mine commercial, *and there has*

never been known to be any copper in the mine, so we did not see what representations we could make to the shareholders to induce them to put up money to carry on operations.” (See Tp., Vol. I, page 398).

Mr. Corry, mining expert on behalf of Appellants, to prove inadequacy of consideration for Alice properties, in speaking of these properties, said:

“Speaking from my own knowledge that is available to everybody these old claims were worked for their silver contents by the former operators, the Alice Company, and by lessees subsequent to that time. In other words, the activity upon the Alice lode has been wholly confined to the mining of silver ores. They may carry a greater or less extent of gold—primarily for the silver contents.” (See Tp., Vol. II, pages 726, 727).

Again:

“As to how extensively the Butte camp was prospected and worked for silver,—it was prospected over a greater portion of the entire district, and for several miles around, for silver, but the actual silver production,—producing properties, were confined more to this northern portion of the camp, and especially to the Alice on the Rainbow ledge, and in that vicinity and to the westerly of the ground shown upon this exhibit,—plaintiffs’ exhibit 1, Corry.” (See Tp., Vol. II, pages 731-732).

Again:

“I do not know of any place in the Rainbow ledge or lode, outside of in the Elm Orlu, where copper ores of a commercial character have been found. What copper they found in the Elm Orlu was in the cross vein, a southeasterly and north-westerly vein; a vein entirely independent and of

a different age and system than the Rainbow system of leads, but in close proximity to the Rainbow lode, as I stated. * * * I do not know distinctly of any east and west vein in this vicinity carrying copper minerals, except that it would be accidental; I cannot conceive of how such a thing could happen." (See Tp., Vol. II, pages 748-749).

Mr. Weed, an expert upon whom Appellants apparently place great reliance, in describing the Alice mine, said:

"I have known the Alice mine and the surrounding property since 1896. I should say, as to just what particular prominence the Alice property has in the general geology of Butte,—it has the largest and best developed silver ledge or lode of any known in this district, and one of the largest probably in the United States; it is a lode that can be traced for a long distance,—I should say, roughly speaking, a mile, and the heart of the mineralization of that lode appears to be in the center of the Alice group; it is a very great lode, which has produced, as we all know, large sums of money in silver, and a lode which, at the time I visited it, was considered to be a probable source of zinc." (See Tp., Vol. II, page 779).

Again, he said:

"I haven't any information that there are any profitable copper ore bodies in the Alice at present,—not any more than the zinc." (See Tp., Vol. II, page 811).

The only competent evidence contained in the record tending to show any copper in the Alice ores is the testimony of Buzzo, in which he said:

"There never were any ores left there simply because they contained copper that I know of. All

the ore in the Alice contained a very small percentage of copper; about one-tenth to perhaps four-tenths of one per cent." (See Tp., Vol. II, page 895).

Mr. Sales, Chief Geologist for the Anaconda Copper Mining Company, and more familiar with the entire Butte district than any other witness called to testify, touching this point said:

"Taking the Rainbow lode, from the presence of copper in that vein such as shown and the general geological characteristics of the lode or veins, *I should consider it* a possibility but a very remote probability of there being commercial copper ore in the Rainbow Lode. I do not know of anything geological, or anything any other way that would indicate the probability of its containing copper at depth. I think the general tendency of the developments in that section up there is rather towards the opposite. I should be surprised to have commercial copper developed in any quantity." (See Tp., Vol. II, pages 910-911).

Appellants seem to rely, as an element of great value, upon the possibility of certain northwest and southeast veins, known in the Butte District as the Blue Vein series, passing northerly and westerly into the Alice ground, and after passing within the surface boundaries of the same, bearing copper ores. It is practically conceded throughout the record by all the witnesses that, so far as known, the Rainbow Lode bears no copper ores. The contention of appellants that the Alice properties have a potential value on account of copper ores contained therein, was, however, practically dis-

allowed by the Court, the Court stating in its opinion that such contention was of little consequence.

Chief among the veins mentioned by Appellants' witnesses, belonging to the Blue Vein series, are the Jessie and Edith May. No witness ventures the assertion that either of these veins passes through or into the Alice ground. All witnesses admit that these veins are pockety, and throughout long distances barren of mineral value. No witness ventures the assertion that even if passing through Alice ground there are any indications that any of such pockets of valuable copper ore would be found therein. It is uncontradicted that as any of these northwest and southeast veins pass northerly and westerly they become leaner in ore values, and instead of continuing to bear copper ores, such ores as are found are of the silver and zinc variety.

All the knowledge now available in reference to these veins was available to the complainants in this cause when, in 1906, they optioned to John D. Ryan, a majority of the stock of the Alice Company on a basis of Six Hundred Thousand Dollars, or thereabouts, for the entire Alice property, with the sole exception that in the Badger State claim the Edith May vein has, within recent years, upon vigorous development, produced more copper ores than it did theretofore.

Any development of copper ores in either of these veins can hardly be said, under the evidence, to be in close proximity to the Alice property, and even if this

were true, in the absence of any substantial proof that said veins continue ore-bearing into the Alice ground, it would be of no consequence. Alice lies within the silver district. The copper district of Butte is also well-defined. Every ore-bearing zone has its limitations. If close proximity were, after forty years of vigorous development in a mining camp, any substantial evidence of contiguous values, then the history of mining ventures should be rewritten.

Mr. Corry, expert on values for Appellants, did not think sufficiently of the possibility of any of the Blue Vein series extending into the Alice property, and bearing therein commercial copper ores, to consider such possibility as a basis for his arbitrary estimate of the value of the Alice property at Three Million Dollars.

Mr. Goodale says:

"I do not know of any extension northerly in the Jessie vein and in the Badger State. * * * The Alice properties lie northerly and northwesterly of the Badger State." (See Tp., Vol. I, page 299).

Again, he says:

"I do not know of any copper ore in the Badger State in any vein which in my opinion extends into the Alice Ground." (See Tp., Vol. I, page 300).

Mr. Ryan says:

"The Badger State claim I should say would be about one thousand feet from the Alice properties, but the Badger State workings more than that, probably two thousand feet from the Alice properties. There was an entirely different character

of ore there. The ores opened in the Badger State are not zinc ores; they are copper ores with some little zinc, but copper ores running high in silver. The Lexington properties adjoining the Alice properties on the south have been worked extensively by the La France Company or one of Heinze's companies within the last four or five years. That lies between the Alice properties, and the copper-producing properties on the western end of the Camp." (See Tp., Vol. I, page 421).

Mr. Ryan then describes the history of the Lexington properties, the attempt of Heinze and his companies to operate the same and expenditure of money thereon, and the utter failure of the Lexington to pay a profit to its operators, and the purchase of the same for the sum of Two Hundred and Fifty Thousand Dollars. (See Tp., Vol. I, pages 421-422).

The Poser mine and the Pilot Butte, mentioned in the testimony, had not made any developments that would give the Alice property any value up to the time that the Alice property was sold to the Anaconda Company. (Ryan—Tp., Vol. I, page 399).

In speaking of the Edith May and Jessie Veins, Mr. Corry, expert mining engineer on behalf of Appellants, also said:

"As a mining engineer, I would say as to these veins continuing until the encountering of the Rainbow lode itself, that between this point last referred to and the southern limits of the Alice property, there are a series of holes which bring this line of outcrop to within possibly 100 feet of the southern boundaries of the Alice group, and I

would say that they would at least continue to the intersection with the Alice lode, and if possible would continue a distance into the Rainbow lode." (See Tp., Vol. II, page 730).

After having given an estimate of the market value of the Alice property at the sum of Three Million Dollars, the witness said:

"All that I know about the Alice is what I got from the surface examination and surface study. I have not been underground in the Alice to any depth; I have been down 30 or 40 feet." (See Tp., Vol. II, pages 736-737).

Again:

"The entire surface has been gone over, back and forth, and has been quite thoroughly prospected. In placing my value on the property, I did not consider whether or not there still was great deposit of a silicious silver ore, a low grade which was too low grade at that time, but which could very likely be treated by a percolating or cyaniding process. I did not consider that that was a feature of it, although of course, it occurs to me, but *I base my valuation of that property as it appealed to me upon its location*,—I considered that the Alice was not thoroughly depleted to the 1500 foot level on the veins there. I considered that the fact of obtaining anything above the 1500 foot level from which I believe there exists some possibilities, would simply add to its worth. *I did not give any value at all to ore bodies that are known above the 1500 foot level.*" (See Tp., Vol. II, page 740).

Again:

"It is my belief that there are great possibilities as to the treatment of what may have been too low

grade silver ores for them to treat at that time. I do not know today of any ores above the 1500 foot level in the Alice properties that I could say I could treat profitably at this time by any process." (See Tp., Vol. II, page 741).

Again:

"I do not know of any place in the Rainbow ledge or lode, outside of in the Elm Orlu where copper ores of a commercial character have been found. What copper they found in the Elm Orlu was in the cross vein, a southeasterly and north-westerly vein; a vein entirely independent and of a different age and system than the Rainbow system of leads, but in close proximity to the Rainbow lode, as I stated." (See Tp., Vol. II, page 748).

Again:

"I do not despair of finding copper ore in the Rainbow lode itself. The Rainbow lode has been developed from the Rising Star on the west on through the Alice ground to the Elm Orlu, and I carry it to the Black Rock, and the Alice is 1500 feet and the Moulten 1500, and I know of no place where copper ore has been found in the vein itself. *Somebody has to finally find something in that vein, and I do not consider that sufficiently developed has been done in that vicinity to tell the last story.* This then is classed not as copper bearing but as a silver vein. It has a different geological formation than the copper veins of Butte." (See Tp., Vol. II, page 750).

The witness then states that the country adjacent to the Alice has been pretty well developed underground, and describes the work on the Pilot, the Currie and the Blue Winger, and declares that he does not know of any

place, either in the Alice ground or outside of it, that copper ore has been found in any of the veins referred to therein; neither in the Currie nor the Blue Wing nor the Chief Joseph nor the Lexington. The location of these different properties will be understood by reference to the maps introduced in this cause. (See Tp., Vol. II, page 750).

Speaking of the northwest and southeast veins collectively, including the Edith May and Jessie veins, the witness said:

“The fact as to whether or not some other vein is pointing towards the Alice ground, and is an ore producing vein or a parallel vein, or a spur that never produced, would certainly be a factor in determining its value, *but my approximation was placed only incidentally upon the possibility of these northwest veins going up.* On my exhibit 2 Corry, I carried that Jessie vein right on through the Rainbow series, and show it a considerable distance to the north, the scale of that map being approximately 400 feet to the inch; and carry it about 1250 feet northerly of the Rainbow lode series. I believe that these northwest veins do, or *will be found*, to go through the Rainbow ledge, with an individuality beyond. *I have never seen this vein doing that.* I cannot say where there are any workings north that would justify the 1500 foot projection north of the Rainbow lode series. (See Tr., Vol. II, pages 753-754).

Again:

“All these northwest-southeast veins carry their ore in shoots,—are pocketed, as the miners call it. They do not have the regular ore bodies that the old east and west, the Anaconda system, has. The

mineralization is more concentrated; *and you find these barren places in the veins for long distances both on the dip and strike generally.* When you get away from where you find your shoot, it is simply a question of possibility of finding another: there being nothing there to indicate whether the shoot is there or not. * * * I do not know of any copper ore of my own knowledge that has been mined from the Jesse vein." (See Tp., Vol. II, pages 753-754).

Again:

"I sketched a projection of the Edith May north to show the turn there of both the Jesse and Edith May, *and as to whether or not the veins that I do pick up in close proximity to the Alice are absolutely those, as stated, or not, I could not say,* but the mere fact exists that at those points are veins having their general strike and of considerable prominence." (See Tp., Vol. II, page 756).

Again:

"I have heard it uncontradictedly stated that the Badger State gets its ore from an old east and west vein called the Badger State vein. Directly speaking it is not an east and west vein, it is north 76 west, passing through the Badger discovery. *I do not know its course as to whether it would go through the Alice ground at all. I have never studied that out on the surface.* (See Tr., Vol. II, page 756).

In reference to the history of the Butte Camp, as to copper being obtained at depth, the witness said:

"Generally speaking the history of the Butte veins is that they carry silver on the surface, and you got copper at depth.—I mean the copper veins. I do not mean the Rainbow lode, the Black Chief lode, or the Nettie, or the Emma. I do not mean

the true silver veins, they carry silver from the surface, and do not carry copper so far as they have been developed." (See Tp., Vol. II, page 757).

According to this witness, the nearest ore-bearing copper in commercial quantities is 3200 feet from the Alice ground. On page 769 of Vol. II of the Transcript he says:

"I should say it is about 1800 feet from the Badger State shaft to the point nearest eastward that I know is profitably worked. It is about 1200 or 1400 feet westward from the Badger State shaft to the Alice ground."

The story of the witness, beginning on page 757 of Vol. II of the Transcript, as to how he arrives at his estimate of the value of the Alice property, and flip-pantly describing as to how he would advise clients to invest as much as Five Million Dollars in a mining venture of this character, with no knowledge of underground workings in the property, 10 miles in extent, with no knowledge of the character of the ore disclosed in these workings, with absolute knowledge that no known process had been discovered for treating these ores, with no knowledge that any copper-bearing veins pass through the property, with no knowledge of the property whatever except a surface examination, makes most interesting and entertaining reading, but leads the mind irresistibly to the conclusion that the value placed upon the property of Three Million Dollars by the witness is altogether speculative; that it is based

upon nothing worthy of consideration by the court; that it is a simple fancy of an idle dreamer, justified only by a fevered imagination or an elastic conscience; and that the estimate of any other amount, however large and fanciful, would have been of equal weight, and that in short the arbitrary estimate given by the witness is worthy of no consideration whatever in view of the premises adopted by the witness in arriving at his conclusions.

Witness Weed, a mining engineer greatly relied upon by the Appellants, also gave an estimate of the Alice ground as being of the reasonable market value of Three Million Dollars. This estimate of the witness is admitted by him to be purely arbitrary. Indeed, he asserts that under the conditions existing in the Alice property every estimated value must be arbitrary. Therein he disagrees with the learned Judge, who, in his opinion, held that an arbitrary price is *prima facie* inadequate.

The estimate of this witness must be absolutely discarded by the Court, for the reason that the basis of the same was largely matters of which the witness had no personal knowledge, purely hearsay and incompetent, all of which was duly objected to in the court below, the objections thereto, being overruled.

This fact vitiates and renders wholly incompetent the estimates of value which seemed to be so persuasive with the District Court, and requires this Court to disregard the same.

The witness was allowed to testify, against objection, as to general information which he had obtained and statements which are contained in the reports of the North Butte Mining Company, in relation to the large production of copper from the Edith May and Jesse veins. (See Tp., Vol. II, page 782). And also in regard to the position of the Edith May vein on the surface. (See Tp., Vol. II, pages 782-783).

In reference to the underground workings of the Alice and Moulten properties, the witness was allowed to, and did, rely, against the objection of the defendants, upon certain maps which he extracted from the official report of the Alice Company for the year 1884, and also on reports given by the different superintendents to the presidents, and reports issued by the presidents, and based his judgment upon this, and he says that he based his judgment as to the value of the property, so far as that factor went, upon this evidence. (See Tp., Vol. II, pages 784-785).

It needs no argument to convince the court that maps made in the year 1884 for the use of the Alice Company, extracted by this witness from the files of the Company, and reports of its superintendents made to the presidents of the company, are hearsay, self-serving declarations and wholly incompetent as against the Anaconda Copper Mining Company in this suit, and wholly incompetent as a basis for the judgment of this witness in reference to the value of this property.

The witness, against the objection of the Appellees,

was also allowed to testify as to certain conversations which he had with a man by the name of Sherwood, touching the success which the said Sherwood had had in connection with the treatment of the zinc ores belonging to the Butte & Superior Copper Company. (These ores are shown by all of the testimony to be of a different character altogether from the zinc ores of the Alice). (Tr., Vol. II, pages 788-789).

The witness, conceding that he was not a metallurgist, but only a mining engineer, that he could not speak as an expert in metallurgy, was allowed to give his opinion that the zinc ores of the Alice property could be successfully worked by existing processes. In determining whether or not this could be done, the witness was allowed to use information which he said he obtained from one Walker, as to the results of certain tests on a shipment of ore which Walker declared he had caused Buzzo to ship to Salt Lake City in the year 1902, which the witness stated he verified as far as possible by the shipping returns and the assay receipt, that is, checking each step in the process by the papers submitted. All this against the objection of the Appellees that the same was hearsay and altogether incompetent. (Tp., Vol. II, pages 789-790).

The witness was also allowed to state from these unidentified papers or contents of the same, insofar as it related to the copper contents in the ores in the Alice mine, namely, that the sample about which witness was testifying, and about which he had no personal knowl-

edge, had 1.4 per cent of copper, and that the old records showed an average of better than 1.1 per cent copper; and having so stated the witness used this as a basis for the conclusion that copper ore might be found in the Rainbow Lode, but the witness did not state that there was any probability of copper ore being found in that part of the Rainbow lode included within the Alice group. (See Tp., Vol. II, pages 790-791).

The witness, in connection with his conclusions of value of the Alice property, was allowed to base such estimate upon hearsay and incompetent evidence of the presence and value of zinc-silver ores, although personally he had no knowledge of the existence or value of such ores.

Both this witness, and also Corry, were allowed to use Exhibits V, W, X, Y and Z, pages 450-459, Buzzo's letters to Walker, as a basis for these estimates. These letters were clearly hearsay, selfserving and incompetent as against the defendants, and were duly objected to.

Having thus fortified himself by these hearsay statements, and treating the same as evidence in the cause, and as a basis for his estimate of the value of this ground, and having added thereto another hearsay element, namely, the values placed on adjoining and less desirable claims, of which there was no testimony then or thereafter produced in the case, the witness stated specifically that the value of this property was three

million dollars. On page 791, Vol. II of the Transcript, he said:

"From my study of the ground, I would say that the value of that property in the early part of May, 1910, giving consideration to the values placed on the adjoining and less desirable claims, and to the other factors, which I have mentioned, I would state specifically, three million dollars."

This estimate, for the reasons hereinbefore given, becomes utterly incompetent, is wholly valueless to the Court, and should be discarded.

A further inspection of the testimony of Weed, commencing with page 801, Vol. II. of the Transcript, shows further references to the hearsay and incompetent testimony touching the shipment of ores from the Alice mines heretofore referred to. Among other things, after giving the pretended metal contents of such ores, he says:

"I have been going on the assumption that the zinc ores would carry 1.1. say, per cent of copper, which would be over twenty pounds to the ton. That would be an important factor in my conclusion as to the value of the ores in the Alice mine."

Let it be noted here that no competent proof was ever introduced which would authorize Mr. Weed to use the results of that shipment as a basis for an estimate of value, or authorize the court in calling the same to its assistance in arriving at a conclusion upon this important point.

The papers purporting to show returns of metal values in this shipment of ore were, against the objection of the Appellees that the same were wholly hearsay and incompetent, introduced in evidence. See testimony of Walker, pages 835-844, Vol. II of Transcript. This evidence was entirely secondary; they were returns that smelting and sampling works had made to Walker. No effort was made to introduce any proof touching the correctness of these returns, or whether they truly represented the value of these ores. Moreover, had such proof been introduced, the evidence was clearly incompetent and of no probative force, for the reason that there was not a particle of evidence that this lot of ore represented the average of the ores disclosed in the Alice workings or a correct or true sample thereof, and from aught that appears in the record, this may have been a picked shipment, taken from a particular place in these workings, and may have been all of this character of ore to be found there. Indeed, it does not even appear by any competent proof, of any nature whatsoever, that this shipment of ore came from the Alice properties.

Upon this incompetent evidence, coupled with Mr. Weed's conclusion (also wholly incompetent because he denied, Tp., Vol. II, page 803, that he was a metallurgist or permitted himself to be so considered) that such ores could be under known methods treated successfully, Mr. Weed, when pressed for the elements of value aggregating Three Million Dollars, said that he con-

sidered the ores disclosed in the Alice workings to be of the value of One Million Dollars, and this was the only specific element of value which he would estimate in dollars and cents. As Corry, so Weed. His reasons for arriving at a Three Million Dollar valuation are so fanciful, contradictory and equivocal, that it is inconceivable that the court should allow such estimate, a predominating influence touching a finding upon this point.

When brought to bay, the witness said:

“As to the speculative nature of my elements of value, when it comes to pinning them down to actual dollars and cents, I cannot say that this element has so much, and that element so much; if I would fix the whole at so much, upon anything definite in dollars and cents,—it affects the values of the claims basing it roughly at say one hundred or two hundred thousand dollars a claim, that would give me a rough estimate; adding the value of the shaft if it were in good condition would be another element, and the large bodies of zinc ores another; so we have the various elements without placing any specific value on any one. As I recall it, the Alice has about twenty-two claims, and some of those fractions have a strategic value which gives them value far in excess of the mere acreage. You have less than three full claims on the Rainbow Lode, and the others are of less importance; for instance, I understand the Little Maggie which was a good vein and profitable to the 700, *but any valuation is always arbitrary.*” (See Tp., Vol. II, page 821.)

In this connection, and as apropos to any probable value which the Blue Vein Series, known to be copper-bear-

ing, would give to the Alice property, even though it had been established that any of them known to bear copper values passed into the Alice ground, the following statement of Witness Weed is significant:

"It is true that the Jesse vein and the Edith May vein, as they go to the northwest there, their mineralization is changing and becoming more like the silver mineralization,—the contents." (See Tp., Vol. II, page 814.)

Mr. Kelley testified:

"On the other hand, the properties of the Alice Company were rather remotely situated, northwesterly from the copper district, or outside of what was known at that time, or in fact still is known, as the boundaries of the copper district." (See Tp., Vol. II, page 853.)

Mr. Gillie says:

"Many of these northwest and southeast veins (Blue Vein Series) are simply fault fissures that so far as disclosures have been made, contain no commercial ores of any account. Others have produced commercial ores from pockets or shoots found occasionally in the vein." (See Tp., Vol. II, page 883.)

Referring to the Edith May vein in the Badger State, Mr. Sales says:

"As to the condition of the Edith May vein in its developments from the Badger State shaft, and particularly westerly from the section of the Badger State shaft as to giving favorable promise of occurrences to the west, the unfavorable condition is that the ore shoots themselves are beginning to fail in copper. While you find the ore shoots there, the ore is the same as in the other

veins. Instead of being a copper ore, it is going to be an ore made up of zinc, quartz and iron. The copper is failing going to the west. I mean the mineralization. No, they are not commercial. I don't know just what would be the best term. You could call it a mineral shoot or a shoot of mineral deposited in the vein. I have made a general observation on all of these veins, that as you go outward from the main copper area you get into veins which are more zincy; that is, there is a transition from one end to the other. Starting in the Alice country, both the northwest veins or the blue vein system and the old Anaconda copper systems consist of the silver vein minerals, manganese, quartz and iron. That is practically all, and then when you get into that district it does not make any difference whether you are mining a northwest vein or east and west, the mineralogical character is very similar." (See Tp., Vol. II, page 918.)

Again he says:

"I do not know of any vein that points on its strike to the Alice ground from the east or southeast or the general easterly direction or that side that gives promise or looks favorable to the finding of ores beneath the Alice surface. I do not know of anything coming in from the other side, the Silver claim side, that would have any particular bearing on the Alice. They are simply veins which are regarded as silver veins, the same as all that country up there. I don't know anything of any particular importance. Outside of the low grade zinc ores that have been referred to repeatedly I know of nothing in the Alice ground or any of it that would give it any tangible value, that you could give it as a mining engineer, except a remote probability or possibility of copper. It really hasn't any great importance. I could not as an engineer place a value on it. It is purely specu-

lative; very much so." (See Tp., Vol. II, pages 920-921.)

Referring to the Blue Vein series, including the Edith May, Jesse and other veins of that character mentioned in the testimony, Mr. Gillie says:

"Taking the veins that point towards or from any of the Alice ground, I would say they are very unfavorable going westerly towards the Alice ground, of finding ore in the Alice ground. There is nothing on any of them that would indicate to me the probability of their carrying ore in the Alice ground, except that there are productive veins in the country that continue on. There is a possibility but not a probability. I could not, as an engineer, place any value on the Alice ground because of that condition, because those veins are pointing in that direction, having in mind the developments which are upon the veins." (See Tp., Vol. II, page 935.)

All the testimony in the record, save and except the incompetent testimony of the witness Weed, heretofore referred to, shows conclusively that the silver-zinc ores disclosed in Alice ground were, at the time of the sale, and continued to be up to the time of the trial, of no commercial value whatever. They are of an entirely different character from the zinc ores of the Butte & Superior, Elm Orlu, and other zinc ores in the Butte district which, after many years of experimentation, are being successfully worked by those companies, and so refractory in character that notwithstanding the marvelous progress made in the art of metallurgy there is

no known process by means of which they can be made so.

Subsequent to purchase by the Anaconda Company, two of the greatest zinc producing firms in the world thoroughly sampled and experimented with these ores, with a view to determining their utility and obtaining leases upon the property, without success. The Montana Zinc Company at one time erected a plant of considerable magnitude and carried on an intelligent effort to successfully treat the Alice ores, but the result was a failure. (See Tp., Vol. II, page 939—Gillie) (Ryan—419, 420, 429.)

The defendants caused the ores in the Alice to be thoroughly sampled, assayed and treated in order to determine their value and the possibility of successfully reducing them. (See Tp., Vol. II, pages 888-900—Buzzo. Febles—903-908.) These samples were turned over to James L. Bruce, a metallurgist of high repute, who, after many years of experiments upon the Butte & Superior zinc ores, had attained a satisfactory method for their treatment, and the result of his tests, together with his conclusions as to the commercial value of the ores in the Alice Mine, is found in the Transcript, Vol. II, page 864-877.) Speaking of his tests, he says:

“Those tests were necessary in order to determine whether the ores of the Alice could be treated profitably by any known processes. I found it was a very difficult ore to treat under any known process, for three reasons or four; a great deal of the mineral concentrates into the fines in crushing,

wherein it is more difficult to separate the different minerals, in fact practically impossible to separate the iron into the zinc to any marked degree; I found also that the silver did not concentrate into the lead concentrates, but that the lead concentrates ran practically the same as the crude ore; I found that a large part of the mineral was finely crystalline, so that it could not be filtered without fine crushing, and I think I have covered the principal difficulties in connection with the concentrating. I found in reducing those ores, that practically all of the silver values go into the zinc concentrates, not all, but a very large portion of them. On the ore that was treated, the ore would have no value either in the zinc ore or concentrates on any new process. (See Tp., Vol. II, pages 865-866)

* * * My opinion is very distinct that the ore of the character of which Mr. Febles gave me cannot be treated at the present time by any known process or known method. There would be considerable margin between the cost of handling it and what you would realize from it at the present time. (See Tp., Vol. II, pages 867-868) * * *

From the appearance of the Alice ore and my experience in handling it, I would say it is quite dissimilar to the Butte & Superior ore. There is a great deal more lead in it, and a great deal more iron. It has iron pyrite. In the Alice ores, judging from the samples I had, the silver does not concentrate into the lead concentrates. In fact, rather the reverse, while in the Butte & Superior ores, the concentration of silver into the lead concentrates is quite marked, the silver in the lead concentrates being of value, and in the case of the sample from the Alice there is no value in the zinc concentrates, while in the Butte & Superior ores, the silver, such as can be thrown into the lead concentrates, is of considerably more value than the same amount of zinc concentrates would be. (See Tp., Vol. II, pages 868-869) * * * I regard the zinc

ores in the Alice mine as altogether speculative in value. I consider that they may have some future value. (See Tp., Vol. II, page 874) * * * I do not know of any process now that is even close to perfection to treat those ores, that would make them commercial. I cannot conceive of any tonnage being mined there that would be profitable, figuring them upon the basis of treatment of a tonnage of 500 tons a day or even a thousand tons a day." (See Tp., Vol. II, pages 875-876.)

Quite significant, as touching the value of this property, is the fact that in the year 1905 or 1906 the Walkers of Salt Lake City, who had the largest interest in the property since the year 1880, and were men of very great wealth, together with others, optioned a majority of the stock of the Alice on the basis of \$1.50 per share, or of \$600,000.00, for the property, and this stock was finally acquired upon that basis by the Butte Coalition Company. Intermediate this date and the sale of the property to the Anaconda Company, nothing of consequence had been developed, either in the way of the treatment of the Alice ores or in the development of the ground, which would add to its known value. It is true that the Badger State mine had produced more abundantly of copper ores than it had theretofore, but this is of no consequence in light of the testimony in the case and it is also worthy of comment in this connection that the thirty thousand shares of Anaconda stock, during the four years from the date of the sale to the date of the trial of this suit, yielded more income to the Alice stockholders than was ever yielded by the Alice proper-

ties, save and except alone the year of 1880. As to this point Mr. Gillie says:

“As to the history of the dividends of the Alice Company, the larger portion of that was paid in the first fourteen years, 1880 to 1894, although some dividends were paid in '98, the total dividends amounting to one million and seventy-five thousand dollars. For the years 1910, '11, '12 and '13, the Anaconda Company has paid about forty millions of dollars, nearly equivalent to ten dollars a share on the thirty thousand shares of Anaconda the Alice Company owns, \$300,000.00. There was forty millions paid in that period, and had the Alice accepted this proposition, they would have been doing better in four years than they did in any other period of its history, even in 1880, so far as returns are concerned.” (Tp., Vol. II, page 936.)

More significant is the fact that late in 1915, under most favorable auspices, at public auction, no bidder could be found for the property at a price exceeding the consideration paid by the Anaconda Company.

IV.

THE CORPORATE BUSINESS OF ALICE HAD BECOME UNPROFITABLE AND COULD NOT BE CARRIED ON BY THE CORPORATION; THERE WERE INSUFFICIENT FUNDS TO CONTINUE THE BUSINESS AND NO MONEY WITH WHICH TO PAY EXISTING INDEBTEDNESS. THE CORPORATION WAS IN FAILING CIRCUMSTANCES AND, INsofar AS ITS FINANCIAL CONDITION AFFECTED ITS BUSINESS PROSPECTS, WAS IN FACT INSOLVENT.

The facts touching the history, business failure, fi-

nancial condition and inability of Alice to carry out the purposes for which it was organized are quite fully disclosed in subdivision III next preceding, to which the court's attention is particularly invited, insofar as it affects the question here involved. To repeat them under this subdivision is unnecessary.

In addition thereto, the court's attention is invited to the testimony of Mr. Ryan, Tp., Vol. I, 397-398, in which he said:

"There had been no operations on the Alice properties, excepting leases, since 1893. After the Butte Coalition Company acquired control of the stock there was no change in the operations. The leases were carried on much the same, as they had been theretofore. No direct company operation, except taking care of the property. We could not undertake to carry on any mining operations on the property. We had no money. The Company was in debt when we took it over, and we had never seen any way of liquidating that debt. It was a non-assessable stock. We could not call on the shareholders for money, and we had no way of carrying on operations. We discussed the matter of borrowing money, offering bonds to the shareholders, but in looking into the affairs, we could not see where we were justified to ask them for any money. The mine had been worked to a depth of about fifteen hundred feet, and even with silver above a dollar an ounce, had closed down. No one had ever been able to find a process that would make the zinc ore in the mine commercial, and there has never been known to be any copper in the mine, so we did not see what representations we could make to the shareholders to induce them to put up money to carry on operations."

And Transcript, Vol. I, page 400, where he also said:

“The Alice Company was without means, was in debt, had nothing in its plan of organization that permitted raising the money except to mortgage the property and attempt to sell bonds, and I had never considered that we had anything upon which we could base representations of the value of the property that would warrant anybody in loaning us a large amount of money.”

V.

THE EVIDENCE FAILS TO DISCLOSE ANY VIOLATION OF THE SHERMAN ANTI-TRUST LAW IN CONNECTION WITH THE ACQUISITION OF THE ALICE PROPERTIES, OR OTHERWISE, BUT EXPRESSLY AND AFFIRMATIVELY SHOWS TO THE CONTRARY.

The Amalgamated Copper Company was organized in the year 1899, for the purpose of acquiring the stocks of certain mining companies operating in the Butte District. Pursuant to its organization, it immediately acquired a majority of the stocks of certain of these companies. Its original capitalization was Seventy-Five Million Dollars; subsequently, this capitalization was increased to One Hundred and Fifty Million Dollars, and a few years after its organization it acquired a majority of the capital stock of certain others of the mining companies in that district.

There is not a scintilla of evidence in the entire record showing that at the time of its inception, or at any time thereafter, it was organized for any evil purpose

whatsoever, except the statement of one Thomas W. Lawson touching certain conversations he claimed to have had with Henry H. Rogers prior to the organization of the Company, which will be noticed further in the argument hereto appended.

The conduct of the Amalgamated Copper Company, as a purely business venture, from the date of its inception to the date of this trial, appears from the record to have been entirely unobjectionable.

Among the companies controlled by the Amalgamated Copper Company was the Anaconda Copper Mining Company, a corporation organized and existing long prior to the formation of the Amalgamated Copper Company. Amalgamated owned a majority of this stock. Anaconda was the largest operating company among the companies controlled by Amalgamated.

Early in the year 1910 it was decided that the physical properties of the different companies controlled through stock ownership by Amalgamated should be consolidated. Reasons essential to the very life of these mining companies and to their continued production of copper ores impelled, if in fact they did not compel, this union of physical properties. These reasons are so pointedly stated by Mr. Kelley, on pages 311-313 of Vol. I of the Transcript, that we feel justified in quoting therefrom somewhat at length:

"I will say that the causes which led up to and resulted in the consolidation were, I think, three, primarily. The first was due to the fact that a

part of the mining companies operating in Butte had reached the point *where they could no longer produce their ores at a profit*; that condition was the result of a necessity of operating separate, independent organizations, running separate plants and hoists, maintaining separate equipment, and making their own individual development to the various ore bodies, owned by these different companies. The result was that the overhead charges were eating up a large part of the profits, and, as I say, with some of the companies it was rather a close proposition, and a close proposition so far as certain territory was concerned. It would be to the best interests of all if a plan of organization could be perfected by which the mining ground that was contiguous to one company or another as the case might be, might be worked without the necessity of each company making its separate individual development. In other words, it seemed like a waste and an unwise expenditure of money to require one concern to equip a surface plant to maintain it separately, to run up to a line and stop at the end of its property, at the end line of its property, whereas its development, its shaft, its crosscuts, its laterals and its surface equipment, were completely adequate to enable that company to proceed and take out the ore and to require another company operating the property contiguously to have its separate plant, and its separate development, and run up, say, to the other side and stop, at its line. Now, that was one cause. The second cause, or the reason that led to this consolidation, was the increasing number of underground mining conflicts that could not be equitably and legally adjusted as between these different companies without the expenditure of an enormous amount of money, from which no good could come. In explanation of that I want to say that in certain districts in Butte, the prospecting development had shown a large number of veins that were not prof-

itable or productive near the surface. Now in order to determine absolutely the ownership of those veins, it would be necessary for the different corporations, owning them separately, to have developed the apex by raising through an absolutely unprofitable portion of the vein to reach the apex, and then opening up the apex, and disclosing it with reference to the exterior boundaries of the different mining companies or claims owned by the different companies. All of that work would have been dead work; it would have cost a large amount of money and as I say, would not have been productive so far as anybody realizing from the actual doing of the work. The third reason that led to the consolidation, was the desire to so consolidate these properties that the very heavy burden, the exploration and development might be carried on for the joint benefit of all of the different companies. For instance, these properties lay—I am not speaking with reference to the Alice properties, because that was an after thought, I think it had no part in the original consolidation—but often times property lay contiguous, the property of one company was contiguous to the property of another company. Now, it cost a great deal of money to prospect and develop and open up these mining claims, and there was not any fair or equitable way in which that charge could be distributed among the different companies. If the Anaconda Company, for instance, had begun an extensive exploration, and found a vein, although it might have been profitable for the Butte & Boston Company, there was no way of dividing the expense, and it was the different complexities that came about in the operation of these different mining companies as separate units that led to the consolidation of the physical properties. I think that is a fair statement of it.”

Again, on page 314, Vol. I of the Transcript, Mr. Kelley says:

“If twenty different companies operated at Butte, independently the expense would be immeasurably greater than if one company operated all of them, *and a good many of them could not be operated at all.*”

And again, on page 315:

“The economies in operation have necessarily been great in order that operations may be carried on at all.”

Shortly after the consolidation and purchase of the physical properties of these companies by the Anaconda Copper Mining Company, the Anaconda Company also acquired certain properties belonging to W. A. Clark, known as the Clark properties, and also acquired the Alice properties—the acquisition of the Alice property was, as stated in the foregoing by Mr. Kelley, an after thought. The continued acquisition of mining properties by the Anaconda Company was absolutely essential in order to continue its life. It was carrying on its mining operations at a rate of from ten thousand to fourteen thousand tons a day. Necessarily, the result was depleted ore reserves. Notwithstanding its acquisition of mining properties, in the year 1910 the ore reserves of the properties controlled through Amalgamated were not as great as they were in 1899. On page 942 of Vol. II of the Transcript, Mr. Gillie says:

“Every mine has an end, and in order to prolong the life of a mining company it is necessary to ac-

quire additional property. That would be the first thing. Since 1899 the Amalgamated Copper Company (Anaconda) has been mining ore at the rate of about eight to ten thousand tons a day, and for the last seven or eight years we have been mining at the rate of thirteen to fourteen thousand tons a day. As to the comparison between the depletion and the acquisition of ore deposits since 1899, in the amount of copper they would control, well, no, they haven't added as much in the way of ore reserves as they have exhausted during that period. * * * I am afraid the Amalgamated has not kept pace with its production. It has exhausted its resources so far as its metals produced are concerned."

The United Metals Selling Company was incorporated about 1899. At that time it took over the business of Lewisohn Bros. as a going business. It engaged in the selling and distribution, in the markets of the world, of the copper production of such of the Butte companies as were controlled by Amalgamated, as well as other of the Butte companies, and also of copper produced elsewhere in the United States.

The stock of this Company was acquired by Amalgamated in 1911. It was a legitimate business enterprise, and it was only through it, or some like company, that the copper production could profitably be disposed of. The necessity for the distribution of copper in this manner is made apparent by the testimony and the character of its operations as touching producer and consumer, its selling of copper being actually from the producer to the purchaser, is disclosed by Mr. Ryan,

pages 408-410, Vol. I of the Transcript, and by Mr. Evans, page 282, Vol. I of the Transcript. Touching the necessity for organizations of this character, Mr. Evans said:

“The reason for a metal selling agency is that it is almost necessary to have a large amount of copper at your disposal, have it at different places in the world, have it marketable and ready for delivery. The metals selling agency sells at the point of delivery. I would say that it is necessary to have an organization that can be kept in constant touch with the conditions that affect the price of copper all over the world. It would be impractical and very difficult for independent or separate producers to maintain such agencies.”

Neither the Amalgamated Copper Company, nor the Anaconda Copper Mining Company, nor the United Metals Selling Company ever controlled either the sale or the production of a major portion of the copper production of the United States alone, and the proportion of the world's production controlled by them, or either of them, was relatively small. Neither did the entire Butte district, in the year 1899, or at any time thereafter, produce a major portion of the copper produced in the United States, and the relative proportion between the copper produced in the Butte Camp and the production in the United States, as well as in the world at large has, since that date, constantly decreased.

From the record, it does not clearly appear what part of the copper production of the United States, or of the world, was controlled by the Amalgamated,

through stock ownership, about the time it came into existence, and after it acquired the control of the Boston & Montana and Butte & Boston Companies. From a mass of statements by counsel, and incompetent testimony, it would appear that probably about thirty-five per cent of the copper of the United States, and about one-fifth of the copper of the world, was produced by these stock-controlled companies. (See Tp., Vol. I, page 290; Vol. II, pages 713-714.) This is, however, not very material, for it does appear from other more or less competent testimony, but the only testimony which Appellants deemed it essential to introduce, that in the year 1910 the copper production of the United States amounted to 1,086,151,430 pounds; that the total copper production of Montana was 288,449,425 pounds. From the Montana production there must be deducted, as produced by independent producers, at least 52,000,000 pounds (See Tp., Vol. I, pages 291-292), leaving the production of the Anaconda Copper Mining Company, after it had taken over the physical properties belonging to Clark, the Red Metals Company, the Butte Coalition, and all the physical properties of the companies which had theretofore been controlled by Amalgamated, through stock ownership, at the amount of 232,449,420 pounds, being only twenty-one and one-half per cent of the production in the United States, and a much smaller per cent of the world's production; and it is worthy of note that ever since the inception of the Amalgamated Company, the proportion of copper produced by the companies controlled by it, through stock ownership or otherwise, to the production in the United

States, and in the world, had been, up to 1910, and ever since has been, constantly decreasing.

In 1910, the United Metals Selling Company handled from one-fourth to one-third of the copper production of the United States. (Tp., Vol. I, pages 408-409.)

The evidence not only fails to show that either the Amalgamated or the Anaconda Company has controlled the price of copper in the markets of the United States or the world, or has made any excessive or unreasonable profits, or has indulged in any discrimination in prices to destroy competitors, or in fixing of prices, or has limited its output, or has treated unfairly any others engaged in the copper business, or indulged in unfair business policies of any kind, or unfair treatment of employes, or has monopolized any commodity necessary in the mining, production and reduction of copper ores, or has controlled to any extent transportation facilities, or has attempted by unfair methods to prevent competition, either in the production or sale of copper, or ever did any act or thing, or attempted to do any act or thing injurious to the public welfare, but the evidence distinctly shows to the contrary upon each of the foregoing. The testimony shows that the Alice properties acquired by the Anaconda Company are neither actually nor potentially copper producers. This point is thoroughly discussed in subdivision III above and the testimony upon the same will not be here repeated.

VI.

FINDINGS OF COURT.

(a) The court in its decision refrains to expressly decide the questions raised in reference to the Sherman Anti-Trust Law, but it almost directly, and certainly impliedly, finds that the complainants in this case could not rely upon the same for the purpose of rescinding and setting aside the sale of Alice properties to the Anaconda Company.

(b) The Court found that the Alice Company was ripe for dissolution and distribution of its assets to its stockholders; that it was under no obligations to further borrow money to carry on its business, and that under the common law the majority of the stockholders had the right to sell and dispose of its property.

(c) The Court found that on account of unity of control between Alice and Anaconda the burden rested upon Anaconda to show that the price paid for the property was adequate, and further found that this burden had not been discharged and that the consideration paid therefor was inadequate; and further found that an arbitrary price was *prima facie* inadequate; and, further found that there was no market value for such a property as the Alice, and that the price of such properties is in any event purely arbitrary.

(d) The Court seems further to have found that while the Alice Company might have taken stock in the Anaconda Company in exchange for its property, with the view to the sale of the stock and distribution of its

proceeds, that Alice could not acquire Anaconda stock under the circumstances of this case, evidently intending to hold it; that there was no intention on the part of Alice, at the time of the transfer, to dissolve the Company and distribute its assets.

Notwithstanding these findings of the Court, the Court provided a method which, in its judgment, was sufficient to correct the error in the proceedings theretofore had, protect the rights of both the minority and majority stockholders of the Alice Company, and under certain contingencies vest title to Alice properties in Anaconda Company, all of which is disclosed in the decision and the decree rendered in this cause.

VII.

GENERAL CONTENTIONS OF APPELLEES UPON THIS APPEAL.

(1) Appellees contend that upon the record in this case the findings of fact and conclusions of law upon all essential controverted questions should have been in favor of the Appellees, and that a final decree, without interlocutory, should have been unconditionally given in their favor, refusing all relief prayed for by complainants and affirming the sale of Alice properties to Anaconda.

(2) That even though the findings of fact made by the Court be not disturbed, and be held by this Court to be justified by the testimony in the case, the decree of the Court is nevertheless correct, and should in all respects be affirmed.

ARGUMENT.

I.

INTRODUCTORY STATEMENT.

We shall first address ourself to the question stated in subdivision (1) of Title VII, that upon the record in this case, findings of fact and conclusions of law upon all essential questions should have been in favor of the Appellees; that no interlocutory decree, but a final decree, should have passed unconditionally in their favor, refusing all relief prayed for by complainants and affirming the sale of Alice properties to Anaconda.

No complaint is made as to regularity of any formal proceedings by which the conveyance in question was authorized. A directors' meeting, properly called and held, adopted a resolution authorizing a contract of sale in the manner thereafter carried out, and calling a stockholders' meeting for the purpose of considering and ratifying such action of the directors. Due notice of this meeting was given, the purpose thereof being fully set forth in the notice which was accompanied by a circular letter setting forth in detail the proposed transaction.

At the stockholders' meeting there were represented 295,100 shares, out of a total of 400,000 shares of the capital stock of the Company. The sale was authorized and ratified by a vote of 289,590 shares of the stock of the Company, as against 5,510 shares voting against the proposition. Of the stock voting in favor of the

transaction, amounting to over seventy-two per cent of the capital stock of the Company, 234,215 shares, or about fifty-eight per cent of the total capital stock, were the property of the Butte Coalition Company, although not standing in its name upon the books of the Alice Company. The 5,510 shares voting against the proposition were owned by Baer, Walker and Geddes, complainants herein. The stockholders' meeting was held May 27, 1910, and the deeds of conveyance were executed, and it was not until November, 1911, eighteen months after the stockholders' meeting had been held, that this suit was instituted, and before this suit was instituted regular and proper proceedings had been taken by the Board of Directors and stockholders of the Alice Company authorizing a distribution of all its property to the stockholders and the dissolution of said Company.

As we understand Appellants, it is contended that the sale should be set aside because under the laws of the State of Utah a conveyance of all of the property of the Alice Company could not be made without the consent of all the holders of its stock, and because the consideration for the sale was capital stock of the Anaconda Copper Mining Company, and because of the claimed identity between the seller and the purchaser, and because the consideration was inadequate, and because the acquisition of the Alice property by the Anaconda Company was in contravention of the Sherman Anti-Trust Law.

The circumstances under which private corporations may sell and dispose, by absolute conveyance, of all of their property, are clearly stated in Thompson on Corporations, Second Edition, Section 2429, as follows:

“First: Private corporations, when expressly authorized by statute, charter or by-laws, may sell and dispose of all the corporate property;

“Second: Private corporations, by the unanimous consent of all stockholders, in the absence of expressed prohibition, may sell and dispose of all corporate property;

“Third: The directors and managing officers have the power to dispose of all the property where the governing statute provides that private corporations may sell their entire property;

“Fourth: Where the corporation is in failing circumstances, or, is in fact insolvent, the directors and managing officers may dispose of all the property or make an assignment of all corporate property for the benefit of creditors;

Fifth: The majority stockholders may alienate all the corporate property when expressly authorized by statute, charter or by-laws;

“Sixth: The majority stockholders, even as against the protest of the minority, may dispose of all the property when the corporate business has become unprofitable and where it would be ruinous to the corporation and the stockholders to continue the business; *or*, when there are insufficient funds to continue the business and no money with which to pay existing indebtedness; *or*, when the corporation is in failing circumstances, or is in fact insolvent.”

The Alice Company, at the time of the sale in question, had the authority to dispose of all of its property in the manner employed; (a) because it was expressly

authorized by statute to do so; (b) because it was expressly authorized by its charter or articles of incorporation to do so; (c) because at the time of the sale the Alice Company was not, and had not been for many years, a going corporation; it did not have sufficient funds to continue its mining business, and had no means of raising sufficient funds to carry on the same, and had no money with which to pay its then existing indebtedness.

II.

A CONVEYANCE OF ALL THE PROPERTY OF THE ALICE WAS EXPRESSLY AUTHORIZED BY THE STATUTORY LAW OF THE STATE OF UTAH.

Section 322 of the Compiled Statutes of Utah of 1907, in force at the time of the transaction in question, which section is quoted in full in Appellants' brief, page 58, among other things, provides as follows:

“* * * And any corporation now existing, or that hereafter may be organized under the laws of this State for the purpose of mining, or the exploration or development of mining property, including lands bearing metal, stones, limestone, oil, petroleum, asphalt and other hydrocarbons, shall, in addition to the powers above enumerated, have the power to purchase, take on bond or lease, or in exchange, or locate, or otherwise acquire any lands, mines, options, territory, fields, or claims, and to sell, convey, lease, bond, mortgage, dispose of, or otherwise deal in the same to such extent as the board of directors may deem prudent, subject always to the provisions of the articles of incorporation and

by-laws; provided, that in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors shall not be valid or binding on the corporation until confirmed by a vote of a majority in amount of the stock outstanding at a meeting of the stockholders duly called to consider such action of the board. When the articles of association provide that the property of the corporation may be sold, mortgaged, or otherwise disposed of by the directors or by the stockholders, sales made in accordance therewith shall be binding on the company."

The provisions contained in the foregoing statute, that a mining company may sell, convey, lease, bond *or dispose* of its property, *or otherwise deal in the same to such extent as the Board of Directors may deem prudent*, subject to the provisions of the articles of incorporation and by-laws, and provided that in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the Board of Directors shall not be valid or binding upon the corporation until confirmed by a vote of a majority in amount of the stock outstanding at the time of the stockholders' meeting called to consider such action of the Board, provide plain, direct and unequivocal authority by the Board of Directors to make a sale of all the property of the corporation, provided the articles of incorporation authorize them to do so. In the event of the articles of incorporation failing to contain such authority, it is provided that such sale is subject to the subsequent confirmation by a vote of a

majority in amount of the capital stock outstanding at the meeting of the stockholders called for the purpose of considering such action before it becomes binding.

The significance of the language "dispose of or otherwise deal in the same to such extent as the Board of Directors may deem prudent," and the language "sale or other disposition of," used in this statute, is pointed out by Appellants in their brief, on pages 51 and 52, wherein is contained an implied admission that this language contemplates power in a corporation to sell and dispose of all of its property, and indeed the same cannot be successfully controverted.

The foregoing statute necessarily carries with it the meaning above suggested, otherwise there would be no purpose in its enactment, and it would be without effect and without meaning. At common law, the Board of Directors of a corporation are authorized to sell, lease, mortgage or otherwise dispose of the property of a corporation, subject to the limitation that they cannot sell or dispose of the entire property of the corporation. It can hardly be contended that the above statute was intended as a limitation upon the power of the Board, but rather from its terms and the language employed, it must be construed to be an extension of the power already possessed. If it was intended to limit the power of the Board, it would have been idle to have suggested that the action of the Board of Directors in selling the property of the corporation was not effective unless confirmed by a majority of the stockholders, and that

of itself is an extension of the common law power. It follows, therefore, if the Utah statute is to be given any force or meaning whatever, it must necessarily be held that the common law power of the Board of Directors was extended, and that with the consent of a majority of the stockholders, the directors of a mining corporation could, as a matter of fact, dispose of all the property of the same.

Language such as is employed in this statute will not be so construed as to become a grant of power only which already existed. The clear intent to extend the power of the Board of Directors of the corporation and of its stockholders is manifest, and the language employed well-adapted for this purpose.

It is our contention that it is immaterial that this act was not in force at the time of the incorporation of the Alice Company, for the reason that at the time of the incorporation of that company in 1880, there was in force the following statutory provision, adopted by the Utah Legislature on February 20, 1874, as follows:

“The Governor and legislative assembly may hereafter modify or repeal this act, but if it be repealed, or if the franchise of any corporation organized under this act, shall be forfeited, the corporation may continue for the purposes specified in section 9 of the act, to which this is an amendment.”

Compiled Laws of Utah, 1876, page 232.

Subsequently, upon the adoption of the Constitution of the State of Utah, a repeal, alter and amend provi-

sion, governing the charters of corporations, was made a part of the fundamental law, and is found in section 1 of article 12 of the Utah Constitution.

There can be no question but that the territorial repeal provision, as above set forth, in its terms was broad enough to cover, and plainly covered, such a change in the statutory law affecting corporations as is found in section 322, *supra*, and as this subsequent act authorizing a corporation to dispose of all of its property is plainly within the provisions of the repeal act of 1874, it must be held applicable to the present situation, unless such holding would render the repeal provision repugnant to the Constitution of the United States.

It is counsel's contention, as we understand it, that because of constitutional limitations, the modifying and repealing act must be construed to have been intended to apply only to such changes in the statutory law affecting corporations as affected the contract between or the rights of the corporations as between it and the state, and cannot be construed to apply to the implied or express contracts existing between stockholders of a corporation and the corporation, or between the stockholders themselves, and that a provision, affecting the right of a corporation to dispose of all of its property would impair or seriously affect the implied or express contracts existing between the stockholders themselves or the stockholders and the corporation.

The very question herein presented was before the Supreme Court of the State of Montana upon a statute very similar to the one in question, in the case of

Allen vs. Ajax Mining Company, 30 Montana, page 490.

In that case the constitutionality of the act of the Legislative Session of 1899, known as House Bill No. 132, if attempted to be applied to corporations formed before the passage of the act, was before the court for determination. The facts in the case were as follows:

Plaintiff commenced an action in the District Court of Lewis & Clark County to secure an injunction restraining the defendants from disposing of certain mining property belonging to the defendant, Ajax Mining Company, a Montana corporation, to the National Prospecting and Development Company, a New Jersey corporation. The National Prospecting and Development Company had made a proposal to purchase all of the property of the Ajax Mining Company, paying in consideration therefor forty per cent of the capital stock of the New Jersey company. After consideration of this proposal the defendant directors passed a resolution calling a meeting of the stockholders of the Ajax Mining Company, for the purpose of considering the question of accepting such proposal to purchase and acquire all of the property and assets of every kind belonging to that Company upon the terms proposed, and directing notice of such meeting to be given, as required by law. Before the

stockholders' meeting the plaintiff, who did not consent to the sale, instituted an action to secure an injunction. Upon the authority of the MacGinniss case the District Court issued an injunction, an appeal was taken, and the question under consideration received full discussion. The Court arrived at the following conclusion (see page 505):

"It cannot be said then, that the enforcement of the provisions of House Bill 132 will impair the obligation of any contract which the plaintiff entered into when he became a stockholder of this company, for the reason that the reservation of this authority to alter, amend or repeal the law under which the company was organized became as much a part of the law of its creation as any other provision respecting it, and became a part of the charter, modifying what would otherwise have been an absolute grant. (Citing 4 Thompson on Corporations, Section 5408).

"It is to be understood, too, that this reservation possesses equal vigor, whether contained in the charter of the particular corporation itself, or in the Constitution or general laws of the state under which the corporation is organized. While there may be some slight conflict in the authorities, the great weight of authority clearly and unequivocally sustains such statutes. (Citing many cases.)

"The theory upon which these statutes are upheld is that whatever rules or regulations for the management, operation or control of a corporation which the legislature might have incorporated in the law under which the corporation was or-

ganized may afterwards properly be engrafted on its charter by virtue of this reserved power existent at the time of the formation of the corporation." (Citing many cases.)

It was accordingly held that the statute was constitutional.

Section 67, Thompson on Corporations, is as follows:

"But if the power to alter or repeal is reserved in the incorporating act or otherwise, as above stated (by the Constitution or a general statute), the legislature may make such alterations or amendments as it may see fit, and the judicial courts shall have no power to consider their propriety."

The view that the reserving clause is for the benefit of the State was set forth in *Zabriski vs. Hackensack, Etc. Ry. Co.*, 3 C. E. Green, 178; 90 Am. Dec. 617, by Chancellor Green, and the dissenting judges in the sinking fund cases took a similar view. Chancellor Green in the *Zabriski* case, cited *supra*, concedes, that the great weight of authority is against his view as to the purpose and effect of the reservation. See also on page 624:

"This view of the case is so clear upon principle that I feel constrained to be guided by it, although the weight of decisions in other states is against it."

In Thompson on Corporations, Section 90, it is said:

"The reserved power of the legislature extends not only to altering the charter, for any purpose

connected with the public interests, but also to altering it for the mere purpose of changing the rights of the corporators as among themselves. This view has been taken in New York, in Massachusetts, in Illinois, in Missouri, and in other states. A necessary result of this doctrine is that the legislature may authorize any change in the organization, purposes or powers of the corporations which the majority may desire, contrary to the will of the minority."

In the case of Schenectady & Saratoga Plank Road Company vs. Thatcher, 11 N. Y. Court of Appeals, 114, the court was required to determine whether, under a similar reservation, a subscriber was released from his subscription by reason of an increase of the capital and the construction of a branch road in pursuance of an act of the legislature amendatory of the original act of incorporation. Under the decision above referred to, see particularly those cited in Keane vs. Johnson. This change was so fundamental in character that it would have released the subscriber at the common law. The court, by Johnson, Judge, says:

"This condition (referring to the reservation of the right to alter, suspend or repeal), is thereby engrafted upon the original constitution of companies formed under this act. The subsequent act was passed and operates under that reservation of power to the legislature. The corporate property is subject to that power by reason of the assent to its exercise implied from and by an organization under the act which reserves it. Every-

one who entered into such company is aware of the reservation of power and of the possibility of its exercise, and trusts, as in many other matters he must trust, to the wisdom and justice of the legislature, that this power will not be abused.

* * * The persons who contract to take shares in a company under such an act, contract subject to the same reservation of power. The courts are bound to read their agreement with the legislative condition. They agree to take and pay for the shares for which they subscribe, subject to the power of the legislature to alter or repeal the charter of the company, and it does not lie in their mouths to complain that the power has been exercised."

So in the case of Buffalo & N. Y. Cent. R. R. Co. vs. Dudley, 4 Kernan, 575, the Court of Appeals of New York again held that it was no defense to an action upon a subscription for stock, that the name of the railway had been changed, and an extension of the road made under legislative authority amendatory to the act under which the company was incorporated, where the power to repeal, alter or amend had been reserved, the court saying:

"The subscription having been valid, so as to give a right of action in case of non-payment to the corporation, did the alteration of the charter and the extension of the road subsequently absolve the defendant from his liability upon such subscription? This question is, I think, entirely settled by the decision of this court in the case of Schenectady & Saratoga Plank Road Company vs.

Thatcher, 11 N. Y. 102. The right to alter was reserved in the charter, and the subscription must be taken to have been made subject to having such additional powers conferred as the legislature might deem essential and expedient. The change is not fundamental. The new powers conferred are identical in kind with those originally given. They are enlarged merely, the general objects and purposes of the corporation still the same. It may be admitted that under this reserved power to alter and repeal, the legislature would have no right to change the fundamental character of the corporation and convert it into a different legal being, for instance, a banking corporation, without absolving those who did not choose to be bound. But this they have not attempted to do. The additional powers are of the same character, and have been regularly acquired from the legitimate source of power, and if they have been fairly exercised, the defendant, although the change may have operated to his pecuniary disadvantage, is still bound by his undertaking. It is no breach of the agreement between the plaintiff and the defendant. It might, perhaps, be inferred from some expressions in the opinion of Parker, Judge, in *Schenectady & Saratoga Plank Road Company vs. Thatcher*, *supra*, that that case turned in some measure upon the fact that there was no suggestion or proof of injury to the defendant's interests resulting from the change complained of. It is obvious, however, that the decision was not based upon any such consideration. It is manifestly a question of power, and if the power was legitimately acquired, and has been exercised without fraud, the rights of the parties are in no respect changed as between themselves, whether the alteration is beneficial or injurious to the defendant's interests. Whether he has made or lost by the

change in no respect affects the question of authority in the plaintiff."

The subject receives a very full and a very satisfactory discussion in the case of *Durfée vs. Old Colony & Falls River Ry. Co.*, and others, 5 Allen (Mass.) 240, to which opinion we respectfully call the Court's attention, and to the many cases cited therein.

See also:

Looker v. Maynard, 179 U. S. 46;
Veener v. United States Steel Co., 116 Fed. 1013;
Market St. Ry Co. v. Hellman, 109 Cal. 571;
Williams v. Nall, 108 Ky. 21; 55 S. W. 706;
Missouri R. R. Co. v. Kansas, 216 U. S. 274.

Under the foregoing cases it is very plain that so far as Section 322 of the Compiled Statutes of Utah is concerned, the extension of power therein conferred to mining corporations which permits a sale and disposition of the entire property, upon such sale being confirmed by a majority of the stockholders, was a constitutional exercise of the power reserved by the legislature, and one of which the complainant may not complain.

The Appellants contend that so far as a Utah corporation is concerned, this question is foreclosed by the decision of the Supreme Court of Utah in the case of *Garey vs. St. Joe Mining Company*. Appellants misconstrue the scope and force of this decision. It is not a precedent for the instant case. The question before the

court was the right of a corporation, organized before the passage of the statute under which the proceedings were sought to be taken, to amend its articles of incorporation, which, as originally filed, contained an express provision that the stock should not be assessable by making provision for assessing the capital stock. At the time of the organization of the corporation the stock was expressly declared non-assessable unless the articles provided that it should be assessable, and it was also provided that it could not thereafter be made assessable without the consent of all the stockholders of the Company. The subsequent statute provided that the stock might be made assessable by a two-thirds vote of the stockholders. The court held this provision of the later statute violative of the provisions of the Constitution of the United States, and further held that the provisions in the charter contained a contract between the corporation and its stockholders which, without violating the constitution of the United States, could not be impaired or changed. While the court did not perhaps take the broad view of the right to amend or repeal taken by our Montana Supreme Court, it did recognize the rule that when the corporation was organized with a statute in force providing for the amending or repeal of the charter in force, that provision constituted a part of the contract between the state and the corporation, the corporation and the stockholders and the stockholders and the state, and it plainly held that where any public right was con-

cerned, a full right to amend or repeal was given, and beyond this, in defining what changes could be made, the court was very guarded in its expression.

The case is easily differentiated from the present one. In the first place the statute which we are now considering was not reviewed, neither has it ever been by the Supreme Court of Utah to our knowledge. In the second place, the reasoning by means of which the Supreme Court of Utah came to its conclusion is not at all applicable to the present one, and an analysis of the decision will clearly show that had this been the question before the court the decision would have been otherwise. The controlling elements in this decision were that by the amendment to the Utah law and the action of the stockholders, the stock of the stockholders, their own personal and private property, as differentiated from the property of the corporation, was rendered liable to forfeiture; that the stockholders were, in order to prevent this forfeiture, compelled to contribute more capital to the corporation than they had agreed to contribute; and that an express agreement had been entered into between the stockholders and the corporation in its articles of incorporation which could not be violated. None of these reasons have any application to the question which we are now considering. The gist of the reasons for the decision is well settled, stated as follows:

“It must be conceded that the full-paid capital stock became the private property of the stock-

holder. As between himself, the corporation, and his co-corporators, he paid the full consideration therefor, and paid all that was agreed by him to be paid. To now say that the Legislature, in face of such an agreement as was here made by the corporators, may authorize a majority to compel a dissenting minority to buy it over again, not only once, but as many times as they may, in good faith, determine, by the enforcement of additional contributions of capital for mere corporate purposes, and to make a sale of their stock, resulting in a forfeiture of all their rights and equities in and to the assets of the corporation, if the unwilling members do not see fit to yield to such compulsion, *is conferring a power which gives to the majority the absolute dominion over the private property of the stockholders, permits a disturbance of vested rights, and the impairment of contract obligations, within the protection of the federal Constitution."*

The court clearly differentiated that case from the present one by the following language:

"As the authorities say, this limited liability is a part of the corporate privilege conferred by the state, and the right to repeal the franchise itself includes the right to repeal any part of, or altogether, the franchise or privilege of limited or *non-personal liability*. The immunity of such liability to the corporators existed in the first instance only because the state had granted it to them, and what it has granted it may, under its reserved power, take away or modify."

The manner of the disposition of the property of a corporation is non-personal so far as the stockholder is concerned. The right to hold property is of the very essence of the grant of the state to the corporation, with-

out which grant it could not take any title whatsoever. The state having granted this right to the Alice Company under the repealing clause of the statute in force at the date of its organization, it had the right to regulate the manner in which it should so hold it, and the manner under which it might dispose of it. The change touched the corporation only and was non-personal in its character.

The court also laid much stress upon the proposition that the non-assessable character of the stock was made a part of the written agreement between the stockholders by the articles of incorporation, and refused to decide whether, if it should not have been the case, the judgment of the court would have been otherwise. Among other things it said:

“In the Rhode Island case the court seems to hold a contrary doctrine, though in that case it is not made to appear that the full-paid capital stock was made non-assessable by the original articles of incorporation, and in that respect the case may be distinguishable from the Nebraska case and the case at bar.”

Again it said:

“The questions as to whether, under the enactment of 1903, two-thirds of the stockholders, or a majority, under the enactment of 1905, are legally empowered to authorize a levy of assessments on full-paid capital stock against a dissenting minority when the original articles place no prohibition on the levying of assessments, or contain no stipulation on the subject, * * * are not now before us. Confined to the question which is before

us, we think the demurrer ought to have been overruled."

The assumption of Appellants that this decision, if in point, forecloses the consideration of this question by the courts of the United States, is also unfounded. The question before the Supreme Court of Utah was whether or not the statute granting authority for the assessment of the stock was in contravention of the Constitution of the United States, and therefore involved a construction of the provisions of the Constitution of the United States touching thereon. The provisions of the Constitution of the United States were so construed by the Supreme Court of Utah as to render the statute of the State of Utah relied upon inimical to these provisions. That court did not restrict the operation of the statute of the State of Utah so as to make the same conform, by its construction, to its understanding of the meaning of the provisions of the Constitution of the United States, but held that the Constitution of the United States prohibited the enactment by the Legislature of the State of Utah of the particular statute relied upon. Thus a federal question was involved, was not foreclosed by the decision of the Supreme Court of Utah, and cannot be foreclosed by the same, and that court took this view of the matter. In speaking of the contentions of the parties, the court said:

" * * * and (2) if it were intended by the Legislature to confer such a power, the right so to do was not within the reservation of the Con-

stitution, for that it was violative of the federal Constitution, prohibiting states from impairing the obligations of contracts *and the taking of property without due process of law.*"

Speaking of the power of the Legislature:

"When reasonably exercised, such legislative enactments do not fall within the prohibition of the federal Constitution."

Again:

" * * * and a legislative enactment which confers such a power is, in our judgment, an impairment of the obligation of a contract which is protected by the federal Constitution."

In the opinion upon rehearing, speaking of the whole question before it, the Court said:

"As the United States Supreme Court is the ultimate authority upon the question as to when such rights are invaded, we need not again refer to the state courts or the books of the text-writers."

When the reason given by the court which has limited this amending and repealing right on constitutional ground is considered, it is plainly seen that the Utah court has not placed itself upon record as being in opposition to the holding in the Ajax case, supra. The reason behind these limitations placed upon the altering and repealing constitutions and statutes is not based upon a construction of their language, and particularly could not be so placed in the case of the Utah Constitution or the Act of the Legislature in force before the

adoption of the Constitution, as the language is broad enough to include every change which the Legislature might see fit to impose upon every right or contract of the corporation. The limitations are upon the ground that neither the Constitution nor the Legislature would have the right to grant an authority authorizing the impairment of certain rights or contracts, and therefore, these repealing Constitutions and statutes must be construed to have meant only such contracts and rights as the Legislature, without violating the federal Constitution, had power to change. Therefore, if the Utah Legislature had power to amend its statute by giving a corporation, as against the dissent of a minority stockholder, the right to dispose of all of its property, or if the state or the public could be reasonably said to have any interest in such amendment, then it must be conceded that the Legislature had full power to make section 322, *supra*, applicable to corporations organized before that time.

The sole ground upon which the general rule referred to by Appellants, that a going corporation cannot dispose of all its property without the consent of all its stockholders, is based, is that to permit this to be done would be to prevent the corporation from carrying out the purposes of its organization, and thus destroy its existence. Therefore, if the Legislature had power under the repeal provision to terminate the existence of a corporation at any time, it must be granted that it had the power to authorize a majority or two-thirds of

the stockholders to take steps which would accomplish the same purpose. That under the repeal statute, existing at the time of the organization of the Alice Company, and the subsequent provision of the Constitution of that State, the Legislature of Utah had power at any time to repeal and set aside the charter of any corporation theretofore formed while the act was in force, is well settled by the authorities. See:

Thompson on Corporations, 2nd Ed., 414-411,
and cases cited;

Cook on Corporations, 7th Ed., Vol. 2, Sec.
639, page 1972, and cases cited;

Greenwood v. Freight¹ Co., 105 U. S., 13.

The Legislature clearly having power to absolutely repeal and annul the charter of the Alice Company, and the Legislature having granted the right to the Alice Company to hold property, the very essence of the purpose for which it was organized, how can it be said that the Legislature would not have power to provide for a proceeding by stockholders resulting in the ultimate termination of the existence of the corporation, or to regulate in any manner, which did not result in the destruction of the corpus of the property or its forfeiture or confiscation, either the acquisition or the transfer of the same?

Again, under the language of the Garey case, if the proposed change were one in which the public or the state would have an interest, there could be no objection to its exercise. How can it be either reasonably or

plausibly urged, having in mind the fact that one of the well-settled purposes of the altering and repealing statute and the Constitution of the State of Utah is to give the State the right at any time to terminate the charter of a corporation, that the state and the public are not directly interested in a provision that permits a corporation, through the action of a majority or two-thirds of its stockholders, to dispose of its property and retire from business when they see fit. Many reasons might be cited where the public welfare in particular cases would be promoted by such a change, and why the right to make the same may not become a part of the public policy of the state to its great benefit and advantage, but these will suggest themselves to the court, and in any event, the state has delegated to the corporation a right to do that which the state could unquestionably do under the alter and repeal provision of the Utah statute.

Neither in the Utah case nor any other cited by appellants that we have been able to find, is there a suggestion that a Legislature has not full right under the amending and repealing provisions to provide for a disposal by a corporation of all of its assets, and on the contrary we have the Ajax case, *supra*, well reasoned and directly in point, and supported in principle by almost numberless authorities, holding that the state clearly has that right; and we submit that the extension of power conferred by Section 322 of the Utah Statutes, conferred upon the Alice Company the right to dispose

of all its property upon such sale being confirmed by a majority of its stockholders, and was an exercise of the power reserved by the Legislature and not obnoxious to any provision of the Constitution of the United States.

The suggestion that Section 322, as amended by the laws of the State of Utah of 1905, is unconstitutional, because the amendatory act contains more than one subject, is without force. The Act relates in its entirety to the powers of corporations, and all its provisions are germane to the title. It is said that the title gives no intimation that mining corporations are to be invested, by the amendment, with any powers other or different from corporations generally. Mining corporations were not treated, in the laws of Utah, separately from other corporations, and were included within this general term. There was no special chapter upon this subject. Due notice was given by the title of an amendment to the sections of the statute touching the powers of corporations, which authorized the Legislature to amend the powers of a mining corporation as well as the powers of any other corporation. It is unnecessary to pursue this subject. The objection of Appellants, and the basis thereof, is not made clear in their brief, and no authorities whatever are cited in support of their contention. Under such circumstances it is not thought that the question invites serious consideration.

III.

BY CONTINUING ITS CORPORATE EXISTENCE AND BUSINESS AFTER THE YEAR 1898, THE ALICE COMPANY BECAME IRREVOCABLY BOUND BY SECTION 322 HEREINBEFORE CITED.

Aside from the consideration of said Section 322 of Compiled Statutes, in connection with the repealing act passed in 1874, we submit that Section 322 is clearly applicable to the Alice Company under the provisions of the following Act of the Utah Legislature. Section 353 of the Revised Statutes of Utah of 1898 is as follows:

“Rights and duties continued. Every corporation heretofore lawfully organized under any law of Utah, and existing at the time of the taking effect of this revision, shall continue in existence with all the rights, privileges, powers, duties and obligations conferred or imposed by the laws under which it has heretofore existed, as modified or controlled by the provisions of these statutes.”

This section in exactly the same form is found as Section 353 of the Compiled Laws of Utah of 1907, in which compilation is also found Section 322 above discussed. Under this provision any corporation organized before the adoption of Section 322, was made subject to the provisions of that section, if it elected to continue business. If it did not desire to be controlled by the provisions of Section 322 it, of course, had the option of surrendering its charter and discontinuing business. Having elected to continue business it must have been held to have irrevocably consented to be bound by the

provisions of section 322, which were extended over all such corporations as should continue in existence by Section 353. As the Legislature clearly had the power to repeal the charter of any corporation, it clearly had the right to compel the corporation to either surrender its charter or subject itself to the provisions of any particular statute, and certainly if the provisions of this Section 353 mean anything, they must mean that any corporation which continued its existence in Utah after 1898, or after 1907, became and thereafter was subject to the laws found in those revisions.

IV.

THE GENERAL RULE THAT CORPORATIONS MUST HAVE UNANIMOUS CONSENT OF ALL STOCKHOLDERS IN ORDER TO DISPOSE OF THEIR PROPERTY HAS NO APPLICATION IN UTAH.

Again, we submit that the general rule invoked by Appellants that a corporation must have the unanimous consent of all the stockholders in order to dispose of all its property, which rule is based upon the fact that such action would terminate the corporate existence and defeat its purposes prior to the time for which the corporation was organized, can have no recognition under statutory law, such as exists in Utah. Under the provisions of Chapter 72, Sections 3661, et seq., two-thirds of the stockholders of a corporation may arbitrarily at any time cause the dissolution of a corporation which, of course, is followed by the distribution of its assets

by sale, or otherwise, among its creditors and stockholders. This is exactly the same proceeding which has been taken, or was being taken taken, in the case of the Alice Company, with the exception of the order in which the proceedings were taken. With such statutory provisions in force, can it be reasonably urged that the purposes for which a Utah corporation is formed cannot be defeated without the assent of all of the stockholders?

V.

THE DISPOSITION OF ALL OF THE PROPERTY OF THE ALICE COMPANY WAS EXPRESSLY AUTHORIZED BY ITS CHARTER.

Another of the general rules providing under what circumstances a corporation may dispose of all of its property, laid down by Thompson, *supra*, is that in the event a provision is made for such sale or disposition in the charter or articles of incorporation. Under the authorities such provision was contained in the original charter of the Alice Company. In the original articles of incorporation of the Alice Company, as shown by the certified copy of those articles introduced in evidence, paragraph 3, and as plead in plaintiffs' amended bill of complaint, is the following:

“The business and pursuit of the corporation shall be to buy, sell, lease, hold, own and operate mines, mining claims, mills, millsites, furnaces and reduction and refining works; to buy, sell and exchange mineral ores and bullion; to buy, lease, con-

tract and operate roads, tramways, and freight and transportation routes, to facilitate the business of the company; to appropriate, buy and sell water, water rights and ways for conducting the same, and generally to do all kinds of business incident to, connected with, or convenient for the management of a general mining business, in the Territories of Utah, Montana, Idaho, and in any State or Territory of the United States."

That provisions such as those above quoted from the Alice Company's charter, plainly gave the directors of the Alice Company or the directors and a majority of the stockholders of that company authority to convey all of its property as against the protest of minority stockholders, is well settled by authority. See:

- Pitcher v. Lone Pine Consolidated Mining Co.,
81 Pacific, 1047;
- Lang v. Reservation Mining & Smelting Co.,
93 Pacific, 208;
- Traer v. Lucas Prospecting Co., 99 N. W.,
290;
- Maben v. Gulf Coal & Coke Co., 56 Southern,
607.

In each of the above cases minority stockholders were contending for the application of the general rule that a corporation cannot dispose of all of its property as against the dissent of any stockholder, but the right was sustained under charter provisions similar, or substantially similar, to those found in the Alice articles.

In the Pitcher case above cited, the court upheld the power of the trustees alone to sell all of the property

of the corporation under the articles of incorporation, a portion of the purposes being as follows:

“The purposes for which this corporation is formed are to work, operate, buy, sell, lease, locate, acquire, procure, hold and deal in mines,” etc.

In the Lang case, in the articles of incorporation it was stated that one of the objects for which the corporation was formed being to buy, sell.....and deal in mines.

In the Traer case above cited, the provision of the articles of incorporation, upon which the right to convey was upheld was as follows:

“The business of this corporation shall be to acquire, purchase, lease, option, own, sell and mortgage coal lands, or supposed coal lands, mineral estates, in the state of Iowa or elsewhere; to buy and sell real estate; to prospect for coal and mine coal and other minerals or mineral products, and generally to buy, sell, handle and deal in and market coal of all kinds.”

In the Maben case a portion of the syllabus, showing the substance of the decision, is as follows:

“Where a private corporation was authorized, among other purposes, to rent or purchase mineral lands and to sell and lease the same, a majority of its stockholders had power to authorize a sale of all its lands and minerals which constituted all its property, over the protest of minority stockholders, who, in the absence of fraud, breach of duty, or bad faith, were not entitled to invalidate such sale, because the corporation was thereby denuded of all its property.”

VI.

THE MAJORITY STOCKHOLDERS OF THE ALICE COMPANY HAD FULL POWER TO DISPOSE OF ALL ITS PROPERTY UNDER THE SIXTH GENERAL RULE GIVEN IN THOMPSON ON CORPORATIONS, SECTION 2429, SUPRA.

Under this rule it is not necessary, as assumed by the Appellants, that the corporation should be either insolvent or in imminent danger of insolvency, as that word is used in its technical sense, before the power of the majority of the stockholders to dispose of the property may be exercised. Under this rule this power may be exercised either, when the corporate business has become permanently unprofitable, or where it would be ruinous to the corporation and the stockholders to continue the business, or where there are insufficient funds to continue the business and no money with which to pay existing indebtedness, or where the corporation is in failing circumstances, as well as when it is in fact insolvent or in imminent danger of insolvency, in the technical sense of that term.

The condition of the Alice Company in these respects is clearly delineated in subdivision III and subdivision IV of our statement of this case, supra, and it would only tend to prolixity to now restate the same. The court's attention is invited to this statement. It clearly demonstrates the corporate business of the Alice Company had for many years been, and was then, per-

manently unprofitable; that it would have been ruinous to the corporation and the stockholders to have attempted to resume the business of mining operations upon the Alice property and bear the enormous expenses thereof without assurance of success; that there were insufficient funds to resume and carry on such mining operations, and that there was no possible way by which such funds could be raised or even obtained by mortgages upon the property; that there was no money with which to even pay the existing indebtedness of the Company; that so far as its business was concerned, and so far as it was concerned, the said Company was in failing circumstances, and utterly unable to carry out the purposes for which it was organized.

Under these circumstances, no principle of public policy, and no right of its individual stockholders, required that it should continue to exist upon the insistence of minority stockholders.

The Supreme Court of this state in the case of Forrester and MacGinniss against the Boston & Montana Consolidated Copper & Silver Mining Company, 21 Montana, page 544, early recognized this exception to the general rule. The facts in that case were that the Boston & Montana Company, a going prosperous Montana corporation, undertook to sell and convey all of its assets to a corporation of similar name, organized under the laws of the State of New York, receiving in consideration for its property and assets, the stock of the

New York corporation. The transaction was complained of by Forrester and MacGinniss, stockholders, and as a result of the litigation which followed, the sale was held invalid. The Court, in stating the basis for its decision, said:

“At common law, neither the directors nor a majority of the stockholders have power to sell or otherwise transfer all the property of a going, prosperous corporation, able to achieve the objects of its creation, as against the dissent of a single stockholder.” (Citing cases.)

And proceeding:

“Our attention is called to certain decisions which are said to recognize a contrary doctrine; but examination discloses no conflict of opinion among the various courts of last resort. *Treadwell v. Manufacturing Co.*, 7 Gray, 393, is typical of the cases relied upon by the defendants. A short extract from the opinion (page 405) will serve to illustrate the error into which counsel has fallen: ‘Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders, for the sale of the corporate property, and the closing of the business of the corporation, was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances, it was in furtherance of the purposes of the corporation to pay their debts, close their affairs, and settle with their stockholders on terms most advantageous to them.’ In that case, as in every one cited by the defendants, the corporation was unable to further prosecute the purposes for which it was created.”

The Massachusetts case referred to in the decision, *Treadwell v. Salisburg Mfg. Co.*, 7 Gray, 393, same case, 66 American Decisions, 490, is perhaps the leading case upon the subject in the United States,—at least, it is the case to which in our investigation, we have found most frequent reference made. In addition to the quotation made in the Montana case above referred to, the court says:

“But we entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances, or quantity. To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters. Corporations established for objects quasi public, such as railways, canal, and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception; as also charitable and religious bodies, in the administration of whose affairs the community, or some portion of it, has an interest to see that their corporate duties are properly discharged. Such corporations may, perhaps, be restrained from alienating their property, and compelled to appropriate it to specific uses, by mandamus, or other proper process. But it is not so with corporations of a private character, established for trading and manufacturing purposes. Neither the public nor

the legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter, they do not undertake to carry on the business for which they are incorporated indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued. If this be not so, we do not see that any limit could be put to the business of a trading corporation, short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency; such a doctrine is without any support in reason or authority."

In *Hayden v. Official Hotel Red Book & Directory Co.*, 42 Federal, page 875, a similar doctrine is announced, where it is held that:

"The right of the majority stockholders of a corporation established for manufacturing and trading purposes to wind up its affairs, and dispose of its assets, even against the objections of the minority stockholders, whenever it appears that the business can be no longer advantageously carried on, is well recognized."

In *Manufacturers' Savings Bank v. O'Reilly*, 10 S. W., 865, cited by the Supreme Court of Missouri, which case is somewhat analogous to the present case in that certain of the directors of the selling and purchasing

corporations were common directors to both corporations, the court held:

"We held in *Hutchinson v. Green*, 91 Mo., 367, 1 S. W., Rep., 853, that, when a corporation became unable to meet its obligations in the usual course of business, the directors could make a voluntary assignment for the benefit of all of the creditors, and that they could do this without the consent of stockholders. So, too, it is the duty of the directors to pay the debts of the company; and they are justified in using the property for that purpose. They may use the property for such a purpose, though the company be thereby disabled from carrying on its business, if they act in good faith. 1 Mor. Priv. Cor. (2nd Ed.) Sec. 513.

"Here the corporation was insolvent,—unable to go on with its business. As said by the referee, it had to go into liquidation of some sort. Had this sale been made to persons other than the directors themselves, its validity could not be questioned by the stockholders in any form of action.

"Directors of a corporation have no right to use their official position for their own benefit, nor can they represent the corporation and themselves in the same transaction. They may be made to account to the corporation for all profits made by the use of the corporate property. (Citing cases.) But, according to what we held in *Kitchen v. Railroad Co.*, 69 Mo., 224, the mere fact that these defendants were directors and stockholders in the selling and purchasing corporation would not make the sale absolutely void."

And accordingly, as the court found that the sale was an advantageous one, although made to the directors, the sale was sustained.

In *Peabody v. Westerly Waterworks*, 37 Atlantic, 807, it appeared that a sale of the entire property of a

corporation had been authorized by a majority of the stockholders of the concern. As in this case, a certain minority interposed an objection. The court says:

“In so far as the bill relates to the rights of the complainant Peabody as a stockholder, it proceeds on the ground that a majority of the stockholders of the waterworks are disposing of its property at a price which he thinks inadequate. The action of the company has been taken by a vote of more than 1,100 out of a total of 1,350 shares. There is no proof of any unfairness, oppression, or fraud in such action. The case as presented is simply that of a stockholder who differs from a large majority of his fellow stockholders as to the expediency of a sale. No reason is shown for the intervention of the court.”

The court accordingly denied a continuance of an ex parte injunction, and inasmuch as the parties had stipulated that the decision of the court upon the injunction hearing should have the same effect as upon the trial of the case, the case was ordered dismissed.

In *Sewell v. East Cape May Beach Co.*, 25 Atlantic, 929, the Supreme Court of New Jersey held that the court would not interfere with the directors in disposing of the property as a whole where there was no fraud and no violation of the company's by-laws and the directors were sustained by a large majority of the stockholders of the concern.

To the same effect see also:

Traer v. Prospecting Co., 99 N. W., 290;

Price v. Holcomb, 56 N. W., 407, at 411;

2nd Ed. Thompson on Corporations, Secs. 2424 and 2429. Note.

Cummings v. Parker, 250 Mo., 427, 157 S. W., 629.

In *Price v. Holcomb*, above referred to, and in *Traer v. Lucas Prospecting Co.*, 99 N. W., 290, the Supreme Court of Iowa lays down a doctrine peculiarly applicable to the present case, inasmuch as the character of the business in both cases somewhat resembles the character of the business formerly conducted by the Alice Company. In these cases it appeared that a sale of the entire assets had been made of the corporation in which the complainant was a stockholder, such corporation having been created for the purpose of carrying on a mining, prospecting and development business. They had acquired certain property which possessed more or less value, but had reached a point where they could no longer carry on the exploitation or development of the property, and accordingly the property was sold. In the last case cited the Court says:

“It is true that the prosperity of the Lucas Company may depend upon the earning capacity of its fuel company stock, and that through this channel the plaintiff’s stock in the Lucas Company may be affected. But the value of the plaintiff’s stock has at all times depended upon the property and prosperity of the Lucas Company, and, unless it has been guilty of fraud which will affect the value of his stock, he must take his chances in its investment. There is nothing in the record in this case even tending to show that the transaction was not fair and honest, and for the best interests of the

Lucas corporation and its stockholders. Indeed, the record presents very nearly such a case as was before the court in *Price v. Holcomb*, 89 Iowa, 123, 56 N. W., 407. The prospecting company held properties, in the form of options, leases, etc., which it believed valuable, but was without means to fully prospect and develop. It made many efforts to interest capital in the venture, with the assent and co-operation of all the stockholders, including those then owning the stock now held by the plaintiff, and it was unable to accomplish anything until the Inland Coal Company took hold of it. Under very similar circumstances, it was held in the case last cited that the sale was warranted, and not a fraud upon the minority stockholders. And in this case it is shown that the value of the plaintiff's stock had been very materially increased by the transaction.

"We reach the conclusion that the sale and transfer were not beyond the charter powers of the corporation, and that it was fully authorized to sell the same for the stock of the other corporation. See also *Miners Ditch Co. v. Zellerbach*, 37 Cal., 543; 99 Am. Dec., 300."

The California case cited in the foregoing opinion contains a very extensive and learned discussion of the right of a corporation to sell under certain circumstances and conditions, all of the property of a corporation, and while it is true that in that case the question came up upon an inquiry into the title conveyed by the corporation, and to that extent is not a precedent, the case is nevertheless an exceedingly instructive one as to the circumstances which will justify a corporation in failing circumstances, unable to carry out the purposes of its existence, in making a sale and conveyance of all

of its property and assets, with particular application to a private corporation under no duty to the public.

In the recent case of *Bowditch et al. v. Jackson Co.*, 82 Atlantic, 1014, certain stockholders of the defendant company attempted to enjoin a sale of the assets of the company to the Nashue Company, claiming that the corporation could not sell out all its assets or dissolve without the consent of all its stockholders unless it was in a failing condition. The court, however, held otherwise. The syllabus, which we think accurately states the case, is as follows:

“The action of a majority of the stockholders of a corporation, whereby, as a part of the process of winding up and dissolving the corporation, they voted to sell all its property to another company at any adequate price, under an arrangement fair, equitable, and free from fraud, was within the power impliedly given them when the corporation was formed.

We quote from the opinion:

“Much has been said in the cases upholding the right of the minority to prevent a sale and dissolution, concerning the protection of their rights and saving their property from pillage by the majority. Just how the majority, which sells its own property at the same time and for the same price it sells that of the minority, gains an advantage over the latter is not readily apparent. Cases might be supposed, and undoubtedly occur, where the majority do obtain some undue advantage from the sale. No one contends that such a sale is valid. But because the power of the majority may be abused, it does not follow that it does not exist. If such a conclusion were to be drawn, minorities

would always rule. The plain common sense of the matter is that this is a business venture, to be carried on as such so long as it appears to be good business judgment to do so. When the time comes that a majority in interest believe that their affairs should be wound up and the proceeds distributed, the rational rule is that this should be done. And since the question here is of a business nature, and the limitations of the power of the majority are fixed by the understanding of the business men who made the original compact, business considerations have more than ordinary weight in determining what the contract was.

"It is admitted on all sides that the majority may sell out if the corporation is insolvent. And when brought face to face with the question whether they must wait until the stockholders' investment is all lost before taking action, the conclusion has been that if insolvency is imminent action may be taken. And the same is true if it is imprudent to continue. 4 Thomp. Corp. Section 4489, and authorities cited. One reason only is given why the power exists in these cases: It is reasonable to suppose that such authority was contemplated, because this is what sound business judgment dictates should be done. The difference between these cases and the present one is of degree only, not of kind. The majority are not obliged to wait until all possibility that the corporation can go on longer has been negatived. Some of the cases have stated that such is the rule; but the result of this would be to compel the majority to continue a losing business until their investment was entirely wiped out. To avoid so absurd a result, it has been said they could close out when insolvency seemed to be approaching. And so various forms of expression have been used to indicate the time when the majority could take action. All these are fairly summed up in the statement that the majority may close out the affairs of the company when it can no longer make a reasonable

profit. It is believed no court would now hold that the rights of the minority were more extensive than this rule implies.

"If the majority may sell to prevent greater losses, why may they not also sell to make greater gains? Bearing in mind that this is purely a business proposition, with no public rights or duties involved, there seems to be no substantial difference between the two cases, as a matter of principle. In each case the sale is made because it is of advantage to the stockholders. Whether the profit to be made is a reasonable one must be a relative matter. Three per cent when others make 2 might be reasonable; but 3 per cent when a sale could be made which would yield the stockholder 10 could hardly be thought an investment a reasonable person would retain. The loss to the stockholder by a failure to sell out on a basis which would yield him 10 per cent instead of the 3 he is receiving is in fact much greater than it would be if a concern went on neither making nor losing when the investment would earn 4 per cent elsewhere. It does not seem reasonable that the majority should have power to make a sale in the latter case, and not in the former. In neither case would the sale prevent positive loss, but in each it would result in positive gain. And the question is one of future prospects. Its decision requires the exercise of business judgment, sagacity and power to forecast coming events. It is not an issue appropriate for trial and decision in courts, but rather one to be settled by the judgment of the men conducting the business in question. In a limited sense, the majority act as trustees for all the stockholders. When their acts are impugned by the minority, it is not the function of the court to set its judgment against theirs in settling the wisdom or policy of proposed action. By the contract of association, all questions of this nature were committed to the majority for final decision."

The contention of Appellants that the substance of the circular sent out by the management to the stockholders of the Company affects in the least the right of the stockholders of the Alice Company to dispose of its entire property if they elected so to do, granted by the common law by reason of its having ceased to be a going concern, is clearly unfounded. What, if any, influence this circular had upon the minds of the stockholders is not made to appear, and is, in our judgment, wholly immaterial. The right existing, the sale may not be voided, even though the reason of the stockholders in voting the ratification might be otherwise, but there is no justification for the conclusion that the stockholders did not have in mind their rights so reserved by the common law as well as the statutory rights undoubtedly given them by the laws of the State of Utah. If the contents of this circular were material upon this point, it is sufficient to say that the statements therein contained were abundantly sufficient to justify a sale of the property in pursuance of this power.

Neither are the reasons given by Mr. Kelley and Mr. Ryan, referred to on pages 48 and 49 of Appellants' brief, as to why the Anaconda Copper Mining Company desired to purchase the Alice properties, of any consequence whatever. They relate wholly to the purpose of the Anaconda Company in purchasing these properties, and not to the reasons why the Alice Company desired to sell the same to said Company.

VII.

THE FACT THAT THE ALICE COMPANY AND THE ANACONDA COMPANY HAD ONE COMMON DIRECTOR DID NOT AFFECT THE VALIDITY OF THE SALE, NEITHER DID IT THROW THE BURDEN UPON THE ANACONDA COMPANY TO SHOW THAT THE SALE WAS FAIR AND THE CONSIDERATION ADEQUATE.

The Court below ruled in effect that on account of unity of control between Anaconda and Alice, the burden was cast upon defendant, Anaconda Company, to show a fair sale and adequate consideration; and further ruled that this burden had not been discharged. This ruling was in line with the contentions of Appellants in this case, and is unjustified in our judgment by either the law or the testimony. In our statement, subdivision II, we treat of the relations between Anaconda and Alice; to this statement the attention of the court is particularly invited, and the same is incorporated under this sub-division by reference. Therefrom it clearly appears that the only relationship calling for attention is the fact that Mr. Ryan was a common director of both companies. It also appears, among other things, that the Butte Coalition Mining Company was incorporated for the purpose of acquiring, and shortly after did acquire, the capital stock of a corporation known as the Red Metals Mining Company, and also purchased and acquired a controlling interest, 234,215

shares out of 400,000 shares, of the Alice Company. The funds with which Coalition purchased Red Metals and Alice stock were obtained by general subscription to the stock of the Coalition Company. At the time of its incorporation this Company had more than two thousand stockholders, and at the time of its dissolution over three thousand stockholders. Thomas F. Cole, disassociated in any way from Anaconda or Amalgamated, was President, and the Board of Directors was, in the main, disinterested persons. No director of Alice was ever connected with either Anaconda or Amalgamated, save John D. Ryan. In affairs of the Alice Company, Mr. Ryan testified that he was guided largely by the advice of Carson and Thornton, mining men of long experience and familiar with the Butte properties, and directors of the Alice, and that was particularly true in relation to a determination of the reasonable price of Alice properties. Beneficial ownership of stock held by the directors of the Alice Company rested in Butte Coalition, but that did not connect such directors with the Amalgamated or Anaconda Companies; and there is positively no basis upon the record for Appellants charging that Coalition or Alice were in any way creatures of, or controlled by, Amalgamated or Anaconda or their officers. There are a large number of stockholders in Alice, not interested in Coalition, who have approved of the transaction with Anaconda. Butte Coalition Company and its stockholders are also interested in and approved the same; and to hold that the

transaction can be voided and the interests of the approving Alice stockholders and Coalition Company and its stockholders injuriously affected, would require most substantial proof of control of Alice by either Anaconda or Amalgamated. No such proof is found in the record. All that is shown upon the record is that the Alice and Anaconda Companies had one common director, Mr. Ryan. The rule announced by the learned Judge below, and maintained by the Appellants, cannot be sustained. The authorities cited by Appellants upon this point apply, in the main, to cases where the director was dealing with the corporation in his personal capacity, and was making a personal profit out of the transaction, or where a majority of each Board were common directors. We believe the general rule to be that a contract between a director of a corporation and his Company is not void, but is voidable at the option of the corporation if exercised within a reasonable time. Such is the rule laid down in *Stewart v. Lehigh Valley Ry. Co.*, 38 N. J. Law, page 505, but no such stringent rule applies to contracts made between corporations having but one common director.

In the case of *Smith v. Ferris*, 51 Pacific 710, the Supreme Court of California had occasion to investigate the question extensively. The Court ably reviews the authorities and holds that in a case where the directors of the corporations buying and selling were the same:

“If the contract was made in good faith; if it was profitable to the stockholders of the defendant corporation; if, as we have shown in this case, the

defendant corporation received at least \$150,000 worth of property for nothing—we hardly see how a dissatisfied stockholder, indulging in the wild presumption that such a one could be found, would be able to avoid it in a court of equity. It would not seem that one dissatisfied stockholder could avoid it, if one hundred others were satisfied with and actively approved it.”

This question was expressly passed upon by the Supreme Court of California in the case of *San Diego v. Pacific Beach Company*, 112 California, page 53. In this case the respondent had five directors, and the appellant nine, and at the time the contract was made four of the directors of the appellant were also directors of the respondent, and it is also claimed that before the completion of the contract a fifth director of the appellant became a director of the respondent. A majority of the directors were also stockholders of both. The contention of the appellant is that because of a common directorate the contract was void and incapable of ratification, etc. The Court says:

“Where two corporations, through their boards of directors, make a contract with each other, the directors who are common to both are not within the rigid rule of the cases which hold that one who acts in a fiduciary capacity cannot deal with himself in his individual capacity, and that any contract thus made will be declared void without any examination into its fairness, or the benefits derived from it to the *cestui que trust*. Two corporations have the right, within the scope of their chartered powers, to deal with each other; and this right is certainly not destroyed or paralyzed by the fact that some, or a majority, of the directors are common

to both. Of course, if such directors should wrongfully and wilfully use their powers to the prejudice of one of the corporations, their action, if not acquiesced in, and contested at the proper time, could be avoided, as in any other case of actual fraud. But such common directors owe the same fidelity to both corporations, and there is no presumption that they will deal unfairly with either; therefore, their acts as such common directors are not void. There are abundance of authorities to this proposition, but it is hardly necessary to refer to any other than that of *Pauly v. Pauly*, 107 Cal., 8, 48 Am. St. Rep., 98, and the cases there cited."

In the case of the *Evansville Public Hall Co. v. The Bank of Commerce*, 144, Ind., page 34, the same rule is announced. It was held that the note made by one corporation in favor of another is not invalid merely because the two corporations have common directors, where it represents a debt justly due from the maker to the payee.

See also *Pauly v. Pauly*, 107 Cal., 8; 48 Am. St. Rep., 98, and cases there cited.

In the latter case the distinction is again pointed out between the case where a director deals personally with a corporation, and the case where the common directors of two corporations participate in the dealings of the corporation, one with the other. The Court announced the rule which is well sustained, that it is not presumed that the parties dealt unfairly with each other. It is only when the director has interests conflicting with those of his principal that such presumption can arise.

VIII.

THE SUBSEQUENT RATIFICATION OF THE CONTRACT OF SALE BY THE STOCKHOLDERS OF THE ALICE COMPANY RENDERS THE QUESTION OF COMMON DIRECTORS IMMATERIAL.

It is insisted that the Court should not overlook in considering this proposition that the deed from the Alice Company to the Anaconda Company does not stand upon the act of the directors of either corporation. It is true that of seven directors of the Anaconda Company, one was a director of the Alice Company, and that of Coalition seven directors, but one was a director of the Alice Company, but if any question existed as to

to both. Of course, if such directors should wrongfully and wilfully use their powers to the prejudice of one of the corporations, their action, if not acquiesced in, and contested at the proper time, could be avoided, as in any other case of actual fraud. But such common directors owe the same fidelity to both corporations, and there is no presumption that they will deal unfairly with either; therefore, their acts as such common directors are not void. There are abundance of authorities to this proposition, but it is hardly necessary to refer to any other than that of *Pauly v. Pauly*, 107 Cal., 8, 48 Am. St. Rep., 98, and the cases there cited."

In the case of the *Evansville Public Hall Co. v. The Bank of Commerce*, 144, Ind., page 34, the same rule is announced. It was held that the note made by one corporation in favor of another is not invalid merely

A plain distinction for most obvious reasons is drawn between a situation where there is a common director, or there are common directors, but less than a majority, and where all or a majority of both boards are the same persons. See

U. S. Rolling Stock vs. Atlantic R. Co., 34 Ohio St. 450;

Leavenworth Co. vs. Chicago R. Co., 134 U. S. 688;

San Diego etc. R. Co. vs. Pacific Beach Co., 112 Cal. 53, 44 Pac. 333;

Evansville Public Hall Co. vs. Bank, 42 N. E. 1097;

Hiles vs. Hiles & Co., 120 Ill. App. 617;

Booth vs. Robinson, 55 Md. 419;

Thompson on Corp., sec. 1241.

VIII.

THE SUBSEQUENT RATIFICATION OF THE CONTRACT OF SALE BY THE STOCKHOLDERS OF THE ALICE COMPANY RENDERS THE QUESTION OF COMMON DIRECTORS IMMATERIAL.

It is insisted that the Court should not overlook in considering this proposition that the deed from the Alice Company to the Anaconda Company does not stand upon the act of the directors of either corporation. It is true that of seven directors of the Anaconda Company, one was a director of the Alice Company, and that of Coalition seven directors, but one was a director of the Alice Company, but if any question existed as to the validity of this contract on account of the common director to both companies, such a controversy is entirely disposed of by the proposition that the action of the respective boards of directors was subsequently ratified by the stockholders of the corporation for whom they acted. It is universally conceded to be the rule that even where a director deals personally with a corporation, and obtains an advantage pecuniary or otherwise in so doing, that if the contract or action is subsequently ratified by the stockholders of the company, it is a valid, binding obligation, and not even voidable.

In *Metropolitan Telephone Co. etc. v. The Domestic Telegraph etc. Co.*, 44 N. J. Equity, 568, the Chancellor held that where a contract was made between two corporations having common directors, and one

corporation would not have had a quorum without counting a common director who was largely interested in the proposed transaction, the transaction might not have been sustained but for the fact that subsequently, at a full meeting of the board of directors, where a quorum, without counting the common director, was present, and the transaction was ratified, no cause for complaint existed.

In conclusion upon this branch of the argument, we wish to call the attention of the court to the rule laid down by Cook on Corporations, Sixth Edition, Section 658, in which the learned author cites authorities so voluminous that it would merely encumber this brief to refer to them.

As stated above, the legal effect of the situation, if the two companies had had a complete common directorate, is unimportant, because the action of the directors was ratified and approved by and made the act of the stockholders. Under the law, if the directors were not disposed to act after the proceedings taken by the stockholders, their action could have been coerced.

At the stockholders meeting the transaction was approved by the holders of 289,590 shares, it having been approved by the holders of over 55,000 shares entirely independent of the Butte Coalition Company, at the meeting, and in fact out of the holders of the entire capital stock (400,000 shares) the only parties who have objected are the complainants in this action, owning about 13,000 shares.

IX.

THERE WAS NO BURDEN OF PROOF UPON DEFENDANTS, BUT IF SO THE SAME WAS FULLY DISCHARGED, AND THE EVIDENCE SHOWS THAT THE PRICE PAID FOR ALICE WAS FULL, FAIR AND ADEQUATE.

We have shown that the Alice Company was expressly authorized, both by the Statute of the State of Utah, and by its charter (and either was sufficient), to dispose of all its property by action of its board of directors, or at least by action of its board of directors ratified by the holders of a majority of the stock. And we have also shown that the evidence clearly showed common law authority upon the part of the board of directors of the Alice Company, and its stockholders, to dispose of all its property, on account of the financial and business condition of the corporation.

While we do not agree with the learned Court below that there is any burden upon the defendants and Appellees in this action, the corporation through its directors and approval of its stockholders clearly having power to sell, yet we assert that an impartial consideration of all the testimony shows clearly that such burden has been fully discharged.

It is contended by Appellants that it devolved upon Appellees to show (a) that the sale was a wise one and in the interest of the Alice Company; (b) that all information in possession of the officers of the purchaser af-

fecting the value of the property was given to the vendor or its officers; and (c) that the consideration was altogether adequate.

THE PRICE PAID FOR THE ALICE PROPERTIES WAS ITS FULL VALUE.

The consideration paid for Alice property is found by the court to have been \$1,500,000 together with the assumption of certain liabilities of the Alice Company. This was a figure largely in excess of the then, or now, known value of the Alice property, and could only be justified on the basis of speculative value which the property might possess to the Anaconda Copper Mining Company, and value which could only be determined by a corporation strong enough to carry the burden of equipping, exploiting and developing the ground in the hope of encountering paying ore bodies, and strong enough to incur the speculative risk of the investment, and so favorably situated that it could carry on explorations at the least possible expense.

Subdivisions 3 and 4 of statement, *supra*, contain a critical analysis of the testimony touching value of the Alice property and the condition of the Alice Company. The same is incorporated herein by reference and the attention of the court invited thereto.

Therein it is clearly demonstrated that the court gave undue prominence in its conclusions as to the adequacy of consideration to the estimates of value by Weed and Corry, and it is further demonstrated that these estimates were wholly incompetent and ought not to have

been considered by the court in any respect; and when these estimates are disregarded, as they should be, the undisputed testimony in the case leads the mind of a candid investigator irresistibly to the conclusion that the consideration paid for Alice was full, fair and adequate.

From this analysis, and from the record itself, it appears that under conditions existing in 1910, and for many years prior thereto, and at the time of the trial of this suit, the Alice properties contained no known ores of any value whatsoever; that for many years the property had been practically abandoned; that base ores remain in the workings of the mine, altogether refractory, carrying silver and zinc, which, notwithstanding the great progress made in the art of metallurgy, remain still unworkable. Although Alice was controlled by wealthy interests, which had kept continuous possession of the property, and had assiduously investigated the question of the reduction of these ores, no profitable method of their reduction had been discovered, and very recent and extensive investigations had proven them wholly refractory to any known processes.

The most successful experimentations for the reduction of zinc ores in the Butte Camp had been carried on by Mr. Bruce, who, after five years and at great expense, adapted a process to the reduction of the zinc ores of the Butte & Superior and Elm Orlu, these ores being much less refractory than the Alice ores. The record shows that Bruce was unable to devise a method

to successfully treat the Alice ores, and that even the high samples introduced into the record by Mr. Walker, the same being altogether hearsay, and the high values referred to in the Buzzo letters, also being hearsay, Mr. Bruce stated at the time of the transaction in question such ores could not be profitably handled, and even at the time of the trial such ores had only a slight value.

The analysis of the testimony, heretofore referred to and the record, shows that the Alice property could only be developed at an enormous expense, and that even a 500-ton stamp mill to treat Alice ores would cost more than \$500,000, and the expense for the development of these properties would be much greater to any other purchaser than to the Anaconda Company, its favorable situation in relation to the property being advantageous to it; that the value of the Alice ores was altogether speculative and dependent upon future indeterminate progress in the metallurgical art; that the discovery of copper ores in the Alice properties was only a remote possibility, and that the amount of development work necessary to demonstrate the presence of such ores could not even be approximately estimated; that notwithstanding ten miles of underground workings and fifteen hundred feet in depth, no copper of value had been discovered therein; that the Rainbow Lode is in distinctively silver-bearing district; that the only hope of finding any copper in the Alice would be in certain northwest and southeast veins which, under the testimony, may or may not penetrate Alice ground,

and that as these veins have been developed and worked in the direction of the Alice property they have become absolutely barren of copper ores; that the estimates of Weed and Corry are based upon hearsay and incompetent testimony and knowledge, and ought to have been discarded; that these estimates are altogether speculative and should not have been used as the basis for determining the question at issue, and that the court should, from the details of the evidence, have decided as to the reasonableness of the consideration for the Alice property.

Said analysis and the record further show that during the entire period of the Company's operations after 1898 the stock of the Company had practically no value; that a few years prior to purchase by Anaconda the controlling interests of Alice property optioned a majority of the stock of that Company at the rate of One Dollar and Fifty Cents per share, or Six Hundred Thousand Dollars for the entire property, and that such stock was thereafter acquired by the Butte Coalition Company at that rate; that following that purchase, and during the period from 1906 to 1910, there had been no particular development adding to its value and no change in its condition; and yet it is now contended that in the year 1910 the value of the stock of the Alice Company had increased to such extent that Three Dollars and Seventy-Five Cents per share was wholly inadequate.

Strongly persuasive, if not conclusive, upon this ques-

tion of value is the proceedings in reference to the Alice property in pursuance of the interlocutory decree. It is a matter of common knowledge of which notice will be taken that the mining situation in the United States was never better than at the time when the Alice property was offered for sale at public auction in the city of Butte in pursuance of the interlocutory decree of the court below. The price of copper had advanced far beyond what it was in 1910, and the products of zinc ores were commanding a price theretofore wholly unknown in the history of the mining industry. The utmost publicity in financial circles of the United States was given to the sale. Notwithstanding this, no purchaser could be found who would bid for the property a price in excess of that paid by the Anaconda Company in the year 1910.

The learned judge below, before entering final decree, should have considered this transaction as evidence touching the adequacy of the consideration paid for Alice, and this court not only may, but should, consider the same in determining whether or not the consideration for Alice was in all respects adequate.

- Blythe v. Hinckley, 84 Federal, 234.
 Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Federal, 476;
 Northwest Trans. Co. v. Boston Marine Ins. Co.,
 41 Fed. 796;
 Street, Federal Equity Practice, Vol. 2, Sec. 1918.
 N. K. Fairbank Co. v. Windsor, 124 Federal, 202.
 Roemer v. Neumann, 26 Federal, 333.
 Deitch v. Staub, 115 Federal, 317.

X.

THE SALE OF THE ALICE PROPERTY WAS WISE AND ADVANTAGEOUS TO THE ALICE COMPANY.

Appellants inquire why the Alice property should have been sold at the time it was sold. This question is answered by a moment's attention to the story of the Alice Company and the condition of its property and its financial situation. What reason was there that Alice should not sell? It obtained an opportunity to sell the Alice property for a fair price, something it had never had a chance to do during the entire history of its existence, during seventeen years of unprofitableness and idleness, and an opportunity which, if not accepted, would probably not occur again for another seventeen years or more. Measured by the selling price, more than a million and a half dollars belonging to the Alice Company had been, for over seventeen years, tied up in this unprofitable investment, yielding not a cent of revenue to its owners. It promised to remain so for an indefinite period. During that seventeen years no purchaser had been found for the property, and no syndicate or corporation who would take a lease and bond upon the same. Its ultimate value depended upon the intellectual processes of some metallurgist yet unknown, and upon the remote probability that such metallurgist, sometime in the indefinite future, might outstrip the present known knowledge of his art and develop a process making such ores valuable.

Development of the property would require, according to Weed and Corry, an expenditure of Two Million Dollars or better. Alice had no value upon which to base the borrowing of this money. The stock was not assessable, and the gentlemen who complain so bitterly now in reference to this trade with the Anaconda Company did not seem inclined to trust Alice for sufficient funds to carry out this development; and well they might be wary of such an adventure, for it might very reasonably be predicted that not only would the money be lost but Alice would also be stripped of all speculative value.

By the sale, Alice acquired property of the value of a million and a half dollars; property which, if converted into cash, which might readily have been done, and properly invested, would bring to Alice stockholders, either collectively or individually, a greater return each year than had ever been received, save and except during one year pending the existence of the Alice Company. Will Appellants please tell us why Alice should not have sold its property?

The wisdom of the sale is not only demonstrated by what is herein stated, and what has been disclosed in this brief and the record, in reference to the value and condition of the Alice property and of the Alice Company, but subsequent events after the year 1910 add confirmation to the wisdom of this transaction. Five years after this trade was accomplished, Alice still re-

mains unproductive and in the same condition as before, and five years thereafter, at public auction, duly and properly advertised, during a period of prosperity unexcelled so far as the mining industry is concerned, no bidder could be found who would offer in excess of a million and a half dollars for all the property of the Alice Company.

Appellants also inquire why the property was not leased and bonded. It does not appear that any opportunity was ever presented to lease and bond the property advantageously, or that any syndicate or association could be found willing to expend the necessary sums of money to develop the Alice property upon the chance of making it profitable; and it is certainly clear that it would have been inadvisable to take the gamble of a lease and bond upon the property when full, fair and adequate consideration was offered in property which was equivalent to cash. To this query we might reply—why did not the complainants in this case, during the seventeen years of idleness of the Alice property, lease and bond this property to some syndicate or association able and willing to undertake the enterprise?

The answer is evident in both instances. It simply could not be done upon a basis advantageous to the Alice Company.

Certainly the Alice Company and its stockholders were most fortunate in being able to dispose of such a property in 1910 for thirty thousand shares of the capi-

tal stock of the Anaconda Company, having a market value of one and one-half million dollars, paying regular dividends of Three Dollars per share per year, and having property, in addition to that of the Alice, with a speculative value almost unmeasurable; and certainly the stockholders of that Company displayed consummate wisdom in accepting the opportunity to convert a dead investment into a profitable and income-bearing one. If this sale had not been made the evidence shows the stockholders of the Alice Company would have, during a period of less than four years, the time between the date of the sale and the trial of this suit, been deprived of Three Hundred Thousand Dollars in dividends paid by the Anaconda Company.

But Appellants say that Weed and Corry have testified that it was not an opportune time to sell the Alice property, that the officers should have waited. Should have waited for how long? The stockholders had been waiting since the year 1898, anxiously expectant, hoping that something could be done with the property. Experiments upon the ores of other properties could not afford relief to the Alice, for the results of these experiments threw no light upon the problem of the Alice ores because of their difference in character. If the management of the Alice Company had not accepted the opportunity offered it by the proposition of the Anaconda Company in 1910, its officers and all others par-

ticipating in such refusal would have been subject to most severe condemnation by the stockholders.

In determining the question of reasonable value of the Alice property, the question as to whether the transaction was an advantageous one to the Alice Company and its stockholders, and in determining the ultimate question as to whether the transaction ought to have been by the court conditionally set aside, we submit that the court should carefully consider the fact that the transaction is opposed by the holders of less than four per cent of the capital stock of the Alice Company, and that it has been approved and decided to be to their best interests by the recorded approval of the holders of more than seventy-two per cent of the stock, and is presumably approved and desired by the holders of more than ninety-six per cent of the stock, and in this connection, as laid down by the court in the Bowditch case, 82 Atlantic, 1014, *supra*, this court should bear in mind that to set aside this transaction is to say that at the instance of the holders of less than one-twenty-fifth of the stock, the holders of the other twenty-four twenty-fifths shall not be permitted to exchange their Alice stock, of doubtful value and non-earning power, for their proportion of the Anaconda stock, having large present value, at least fair earning power, and speculative value difficult to estimate. But while this feature of the case may not be controlling, certainly in determining the question of reasonable consideration and of

whether the transaction was an advantageous one to the Alice Company, the judgment of the men holding its stock must be of great assistance, and the judgment of Mr. Ryan, of whom the court in its opinion said:

“* * * there is nothing to inspire belief that they aimed at aught but fair bargaining, or that they designed injury to Alice and consciously abused their trust,”

must be most persuasive.

At the stockholders' meeting, outside of the stock in which the Coalition Company was interested, the record shows that 122 individual holders directly approved of the transaction. Each of these stockholders presumably knew more or less of the Alice property and its condition, and had opinions as to the value of their stock. Thus, we have the decisions upon this question of value and advantage of more than 122 individual stockholders who openly recorded their approval, in addition to the many holders of the remaining twenty-four per cent of the stock who have indicated their approval by assenting to and not objecting to the transaction, and certainly the judgment of all of these individuals upon a matter in which they were directly interested must be of great effect upon any decision as to the questions before this court. In addition, of course we must presume from the record the approval of the transaction by the 3500 individual stockholders in the Coalition Company, who, in proportion to their stockholdings, were interested in the assets of the Alice Company.

XI.

NO OFFICER OF THE ALICE COMPANY CONCEALED ANY MATERIAL FACTS FROM THE ALICE STOCKHOLDERS.

The question as to whether Mr. Ryan, or any other officers of the Alice Company, or even of the Anaconda Company, although certainly the Anaconda Company or any of its officers, as such, owed no duty of enlightening the Alice Company or its stockholders, did or did not lay before the Alice Company all of the facts within their knowledge as to the Alice or other ground in the Butte District, is clearly immaterial, as there is no stockholder before the court complaining that he gave his consent to the sale to the Anaconda Company because of any misstatement concerning, or lack of knowledge of, any material fact. None of the complainants voted in favor of the transaction, and none of the other stockholders, who together owned more than 96 per cent of the stock of the company, are complaining of the transaction, but it is idle upon this record to talk about there having been a concealment by anyone of any material fact. So far as the Alice Company was concerned, the condition of its properties, their developments, were matters of general public knowledge, and were shown by the records kept in the company's office. No development of any importance had been made since the ceasing of operations in the early '90's. The records of such sampling of the ore

as had been done since the taking over of its stock interest by the Coalition Company, were matters of record in the office of the company at Butte, and open to any stockholder, but results of this sampling were not at all encouraging. As to any facts known by any of the officers or representatives of the Anaconda Company, and the workings carried on in the adjoining mines, the evidence clearly shows that these developments, so far as they had any bearing on the value of the Alice properties, were unfavorable; and it is clearly illustrated by the evidence of Mr. Corry and Mr. Weed, that the facts of general and common knowledge in the Butte District concerning the operations of the Anaconda Company and other companies in the northwestern part of the Butte Camp would tend to give any Alice stockholder or other person a much more favorable opinion than the developments and conditions themselves would justify.

The only concealment of facts shown by this evidence was on the part of Mr. J. R. Walker, one of the complaints, who testified to the apparently favorable gross value of ores which he had had shipped by Mr. Buzzo and treated in Utah, and upon which he based his idea of the value of the property, placing it at in excess of ten million dollars. He stated that he had placed the returns and written data concerning these ores and their values in the pigeon holes in an office in Salt Lake, and had never communicated these facts to Mr. Ryan or any other officer of the company.

All of the Alice stockholders had knowledge or full means of knowledge of all the facts regarding the Alice Company and its property at the time of the transaction with the Anaconda Company. The condition of the property and its value was in no wise belittled or unfairly pictured to them in the circular letter sent them by the officers of the company, preliminary to the stockholders' meeting held in May, 1910.

XII.

UNDER THE CIRCUMSTANCES OF THIS CASE THE CONVEYANCE IN QUESTION IS NOT AFFECTED BY THE FACT THAT THE CONSIDERATION PAID THEREFOR WAS CAPITAL STOCK OF THE ANACONDA COMPANY.

A great portion of Appellants' brief is devoted to a discussion of the question as to whether or not Alice had authority to accept stock of the Anaconda Company in payment for its physical properties, and in order to justify a discussion of this question it is assumed, contrary to the record and contrary to any evidence in this case, that Alice either accepted this stock with the intention of holding the same permanently as an investment, or that it accepted the same with the intention subsequently, upon the dissolution of the Company, to compel each individual stockholder to exchange his Alice stock for stock of the Anaconda Company.

Neither of these assumptions finds any substantial

basis in the record, but on the contrary it clearly appears that it was the intention of the officers of the Alice Company to accept this stock in payment for the Alice properties as a step in the liquidation of the affairs of the Alice Company; and it further appears that before the complainants brought this suit, proper and legal steps had been taken by the Alice Company, through its directors and stockholders, authorizing the dissolution of that Company and the distribution of its assets to the various stockholders.

There is nothing disclosed in any of these proceedings that tends to indicate that it was the purpose of the Alice Company to compel the stockholders of the Company to take Anaconda stock in kind, and the presumption undoubtedly is that the dissolution of the Company so authorized would be carried out according to the laws of the State of Utah; and if such laws required either the sale of the entire stock of the Anaconda Company, held by the Alice Company, or the distribution in kind to those stockholders who were willing to accept the same, and the sale of the remaining stock and the distribution of the proceeds thereof to those stockholders preferring the proceeds of the sale of the stock to the stock itself, that necessary proceedings therefor would have been completed by the Alice Company had not the complainants in this cause interposed an objection and instituted legal proceedings to prevent the Alice Company from doing the very thing which they now say the Alice Company should have done.

Complainants say that there is no express power delegated to a corporation by the laws of the State of Utah to own or possess the stock of any corporation; therefore this transaction is ultra vires and should be set aside as being against public policy.

It is true that there was no statute that authorized expressly a corporation to acquire the stock of another corporation. The public policy of any state need not be indicated by an express statute giving the right, but may be shown by implication from legislative acts. The Statute of Utah, Section 344, of the Compiled Laws of Utah of 1907, allowing the consolidation of corporations, is, however, strongly persuasive as indicating the public policy of Utah in that respect; and as was decided in the case of *MacGinniss v. Boston and Montana Company*, where, under a statute of the State of Montana similar corporations organized under the state laws are permitted to consolidate, it is indicative of the fact that there is no public policy contrary to permitting a foreign corporation to exercise this power.

In speaking of the persuasive effect of the statute in Montana, the court says (29 Montana, 428, at page 458):

"It is therefore not against the public policy of the state for one corporation to hold and vote stock in another of like character. The provisions of the statutes supra are to be construed as amendments to the general laws authorizing the formation of corporations and defining their powers, within the

purview of Section II of Article 15 of the Constitution, *supra*. The public policy of the state varies from time to time. It is not to be measured by the private convictions or notions of the persons who happen to be exercising functions, but by reference to the enactments of the law-making power, and in the absence of them, to the decisions of the courts. When, however, the legislature has spoken upon a particular subject and within the limits of its constitutional powers, its utterance is the public policy of the state.

"The Constitution does not prohibit consolidation. Its prohibition extends only to any device by which an attempt is made to deprive the state courts of jurisdiction. Section 527 of the Civil Code expressly authorizes consolidations of domestic corporations. House Bill 132, *supra*, impliedly authorizes them between domestic and foreign corporations, or, at least, goes to the extent of empowering one domestic corporation to hold stock in another of a similar character."

The court, therefore, upon that and other grounds, determined that it was not against the public policy of the state to permit the stock of one corporation to be owned by another of similar character.

So, too, it might be urged that the Constitution of the State of Utah does not prohibit the consolidation of corporations or the holding of stock by one corporation in another corporation. Its prohibitions in this respect are limited to prohibiting railroad corporations from consolidating the stock, property or franchises with any other corporation.

See:

Section 13, Article 12, Constitution of the State of Utah.

It is not necessary in this case, however, to contend, neither is it necessary to sustain the position of the defendants to contend, that authority exists in the Alice to acquire, own, possess and hold indefinitely, and as a permanent investment, the stock of any other corporation. One of the principles upon which this transaction is justified is that notwithstanding the most stringent limitations against a corporation exercising the power of holding stock in another corporation, still such a corporation is permitted by law to acquire and hold the stock of another corporation when such requirement and holding of stock is not intended to be of a permanent nature, but is temporary in character, and is done for the purpose of turning unprofitable assets of a corporation into liquid assets, and as a step leading towards the dissolution of the Company, and when it is the intention of the corporation either to distribute the stock or the cash obtained from a sale thereof upon dissolution proceedings regularly carried out, or where it is intended to sell or otherwise dispose of such stock.

The rule is very well settled in Thompson on Corporations, Edition of 1899, Section 8356, where it is said:

“A transfer by a corporation of its entire assets and property of every description to another corporation, in exchange for the shares of the latter, made not with the intention of winding up its affairs and dividing its stock among its own stockholders, nor as a temporary arrangement, but as a permanent investment, is *ultra vires*, and may be set aside at the suit of a dissenting stockholder.”

Such a transaction is perfectly legal, and under the circumstances shown in this case a corporation may take stock in another corporation, although not authorized by its articles of incorporation so to do.

Section 4064 of Thompson on Corporations, lays down the rule as follows:

“There are still other exceptions to the general rule prohibiting a corporation from taking stock in another corporation. It has long been recognized to be within the power of a corporation to sell its products to another corporation, and, under some circumstances, to sell all of its property to another corporation, and take the stock of the latter in payment or in part payment of the property so sold. This power has been recognized especially in cases where corporations were heavily indebted and such a transaction was the only apparent means of liquidating the indebtedness. Thus in a Rhode Island case, directors of a corporation were held to be justified in disposing of an unsalable factory on which existed a heavy indebtedness, and taking in part payment therefor the stock of another corporation. These principles are supported by other decisions. The delivery of the certificates of stock under a contract of sale of property to be paid in stock, was held to operate as a discharge for the price.”

See also:

Thompson on Corporations, Secs. 4063, 4065 and 4066.

The rule is thus stated in Clark & Marshall on Corporations, page 531, as follows:

"It has been held that a manufacturing corporation cannot sell goods to a railroad or other corporation, and take payment therefor in stock of the latter; and this proposition is no doubt sound law when the intention is to hold the stock as an investment or for the purpose of controlling the other corporation. There is no reason, however, why a corporation which has the power to dispose of property should not be allowed, in the absence of express prohibition, to sell it for stock in another corporation, provided the transaction is for the bona fide purpose of advantageously disposing of the property, and the stock is taken with a view of selling it and converting it into money."

In *Holmes and Griggs Mfg. Co. v. Holmes and Wessell Metal Co.*, 127 N. Y., 252; 24 American State Reports, 448, the doctrine herein contended for is distinctly affirmed, as follows:

"It is doubtless true that a corporation cannot purchase or deal in stocks of other corporations, unless expressly authorized by law so to do. (Citing cases.) It is equally true, however, that it may do whatever may be necessary in the exercise of its corporate franchises. The selling of property and collection of debts is among the powers given, and hence it may take title to all kinds of property, even the stock of another company, in the payment of a debt. The statute under which the plaintiff was incorporated provided that 'it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation.' Laws 1848, c. 40, Sec. 8. The funds here spoken of evidently mean the money of the company, and the statute was not intended to limit the powers of the corporation beyond that already indicated."

In *Hodges v. New England Screw Co.*, 53 American Decisions, page 624, a case was presented somewhat similar to the present one, where a corporation in failing circumstances undertook to convey all of its property, and receive in payment the stock of another corporation. The Court says:

“There are large classes of corporations in Rhode Island and the other states, which may and do rightfully invest their capital in the stock of other corporations; such, for instance, as religious and charitable corporations; and corporations for literary and scientific purposes. So insurance companies may rightfully invest their capital in the stock of other corporations, such as banks and railroads, and the like. Nor have we any doubt that the screw company might have rightfully taken this stock in the iron company, in payment for their rolling-mill, if it had been taken with a view to sell again and not permanently to hold it.”

This principle was expressly recognized in the case of *McCutcheon v. Merz Capsule Co.*, as decided by the Circuit Court of Appeals in the Sixth Circuit, Justices Taft and Hammond concurring with Justice Lurton, 71 Federal Rep., 787, although the Court held that the facts did not, in the particular case, bring the corporation within the exception to the general rule. Said the Court:

“The general rule is that, without express authority, a corporation cannot invest its funds in the stock of another corporation. (Citing authorities.) To this rule there are certain exceptions, due in part to strong implication from the powers

expressly granted, or to the objects and purposes for which stock has been acquired. This under the rule that the implied powers of a corporation are only such as are necessary to the exercise of its corporate franchises, it has been held that where a debt was collected in the stock of another company, it was a valid transaction, under the implied authority to collect its debts in the most efficient way. (Citing cases.) So, in *Treadwell v. Manufacturing Co.*, 7 Gray, 393, 405, it was held that, for the purpose of retiring from business, it was competent for a manufacturing corporation to sell the whole property of the corporation, taking payment in the shares of a new corporation, to be distributed among the stockholders of the old company. * * * That the facts of this case do not bring it within any well-recognized exception to the general rule inhibiting such investments is to us a most obvious proposition."

In *Byrne v. Schuyler Electric Mfg. Co.*, 65 Conn., page 348, the doctrine is also recognized, where the Court says:

"Nor do the cases cited deny that a corporation, under some circumstances, might expend its whole capital in the purchase of the stock of another corporation; as if such purchase was made for the purpose of selling the stock, and not permanently to hold it. That is what was said to be lawful in *Hodges v. New England Screw Co.*, 1 R. I., 347. So, too, if such a purchase was made by a corporation in embarrassed circumstances, as the most advantageous way of closing its affairs, paying its debts and settling with its stockholders, it would be legitimate. This was what was done, and decided to be proper, in the *Treadwell* case."

In conclusion, after a review of the authorities, the Court says:

"It may be stated as a general rule we think, subject possibly to some exceptions, that a corporation may not become a stockholder in another corporation for the purpose of holding the stock permanently, unless expressly authorized to do so. A solvent corporation may buy and sell the stock of another corporation, if done in the usual course of business, and may become the owner of such stock if taken in payment for debts; but an insolvent corporation may take the stock of another corporation only for the purpose of closing up its business, to be divided in kind, or to be converted into money and divided among its creditors and shareholders."

See also:

Metcalf v. American School etc. Co., 122 Fed. 115;

Treadwell v. Salisbury Mfg. Co., 7 Gray, 393.

That a national bank may take the stock of any corporation not for the purpose of dealing in stocks, but when it is necessary to hold the same temporarily, as for the satisfaction of a debt, see 92 U. S., page 122.

In this case, as shown by the evidence, not only was it the intention of the directors of the Alice Company, if authorized by the stockholders, to bring about the dissolution of the company and the distribution of its assets, but there has been introduced by the complainants a copy of the minutes of a meeting held by the stockholders at which proceedings were regularly taken as caused the submission of the proposition to the stockholders to dissolve the company, and such proposition

was carried by a vote of practically three-fourths of the stockholders of the corporation. Under the laws of Utah such dissolution may be authorized by a vote of two-thirds of the stockholders. Such is now the law and such was the law at the time of the creation of the Alice Company. It is alleged in the bill and disclosed by the evidence, that thereafter, in accordance with the Utah statutes, such proceedings were instituted in the District Court of Salt Lake County, Utah, as would have resulted in a decree of dissolution having been entered had it not been for the litigation instituted by the complainants in this action. These facts are sufficient in themselves to demonstrate that it was the intention of the officers of the Alice Company to dissolve it and not to convert it, as suggested by complainants' counsel, into a mere stockholding corporation.

Mr. Kelley testified that before the institution of the corporate proceedings which resulted in the transfer to the Anaconda Company, it was determined by the directors of the company, if the transaction with the Anaconda Company should be authorized by the stockholders, to thereafter proceed to dissolve the corporation and to liquidate its assets and divide them among the stockholders. It is expressly shown by Mr. Kelley's testimony that it was not the intention to force any of the Anaconda stock upon any stockholder who did not desire to take the same, but in such case the stock would be sold and the proceeds turned over to such objecting stockholder. The strongest corroborating evidence that

could be offered as showing that Mr. Kelley truly stated the purpose of the officers of the company is shown by the fact that long before the commencement of this action, and after the property had been conveyed to the Anaconda Company, so that the Alice Company was in a condition to be dissolved and its assets distributed, the necessary stockholders meeting was held and statutory proceedings instituted to accomplish such dissolution in compliance with the laws of Utah.

But counsel argue that because of the fact that the circular letter to the stockholders accompanying the notice of the stockholders meeting of May 27, 1910, at which the sale was authorized, did not also lay before the stockholders for consideration at that meeting the question of dissolution and did not state the plan of the directors as to the dissolution of the company, that such failure is strongly persuasive of their contention that no dissolution was intended. Until the stockholders at their meeting should consider and ratify the transaction with the Anaconda Company, and until the property had been conveyed and the assets of the Alice Company were in condition to be distributed or liquidated, the meeting authorizing the dissolution could not properly be called or held, and certainly such proceedings would have been somewhat premature until, at a stockholders meeting, the holders of two-thirds of the capital stock, the amount required by the Utah laws, had indicated their desire to consummate the transaction with

the Anaconda Company, and put the Alice Company in condition to be dissolved.

Counsel further argue that because this circular spoke in encouraging terms of the value of the Anaconda stock, which would be received in exchange, is an indication that it was the intention to have this stock held by the Alice Company as a permanent investment.

Whether an Alice stockholder upon subsequent dissolution should elect to take his proportion of the Anaconda stock, or should insist upon having it sold upon the market so that he might receive the proceeds, it certainly was of interest to him that the stock was of large value, and it is rather a forced inference from this language to say that it indicated an intention to permanently keep this stock in the Alice treasury. What purpose would there possibly have been in the minds of the Alice directors in planning to subject the Alice stockholders to the expense and trouble of keeping such corporation alive merely to hold the Anaconda stock, when each stockholder could as well control his proportion or receive the proceeds of it if he desired. Again, as shown by Mr. Kelley's testimony, the keeping alive of the Alice Company would have also prevented the dissolution of the Butte Coalition Company, and would counsel ask the court to believe that the Alice directors, who he claimed were controlled by the Butte Coalition Company, had settled upon this useless proposition of keeping the Anaconda stock in the Alice treasury, and thus entail the expense and trouble of keeping in existence these two large corporations.

Counsel further criticise the evidence of Mr. Kelley regarding the intention of the Alice officers by stating that his conferences were merely with the directors as individuals, and that no official action was shown to have been taken towards declaring the intention of the directors to dissolve the Alice Company prior to the stockholders meeting authorizing the same. As shown above, the matter was not in condition for action by the Alice board of directors until after the Anaconda transaction had been ratified by the stockholders, and when it came time to act, the board met and caused the proper proceedings to be instituted for the dissolution of the company.

Under the facts in this case it is immaterial whether any technical corporate action was taken by the directors of the Alice Company declaring intention to dissolve the Alice Company. Such intention is clearly disclosed, and before the suit of the complainants, proper corporate action upon the part of the stockholders and directors had been taken to effectuate this purpose. This purpose would have been effectuated, the corporation legally dissolved and its assets legally distributed to its stockholders had it not been that these complainants instituted legal proceedings preventing the Alice Company from carrying out and accomplishing the very things which they now assert should have been carried out and accomplished by the Alice Company in order to render the acquisition of the stock of the Anaconda Company by it a legal transaction. Therefore, the pur-

pose of this suit is not to prevent the Alice Company from doing an *ultra vires* act, by holding permanently the stock of the Anaconda Company as an investment, but to prevent it from doing the very things which these complainants say it should have done. Under these circumstances it is wholly immaterial whether the directors of the Alice Company, prior to the sale of the property, passed a formal resolution declaring it to be the intention of the Alice Company to distribute its assets among its stockholders and dissolve the corporation; and the complainants may not rescind the sale of Alice to Anaconda upon the ground that the Alice Company has not done the things which it ought to have done, when in fact the Alice Company would have done those things and had taken proper legal steps to have those things done, had it not been for the intervention of complainants themselves

XIII.

THE CONTRACT OF SALE HAVING BEEN FULLY EXECUTED, THE CONTENTION THAT ALICE COMPANY HAD NO POWER TO TRANSFER FOR CAPITAL STOCK CANNOT NOW BE URGED BY A STOCKHOLDER OF ALICE IN BEHALF OF THAT CORPORATION.

If it be conceded, as it must be, that the Alice Company had power to sell its property to the Anaconda Company, and that under certain conditions it had a right to accept the capital stock of the Anaconda Com-

pany in payment therefor, the contract, after the same has been fully executed, the consideration paid and the property transferred, cannot be rescinded upon the suggestion of a dissenting stockholder of the Alice Company. If it was the purpose at the time of the making of the contract of sale to dissolve the Alice Company, upon the transaction being completed, to liquidate its assets and divide them amongst the stockholders, the Alice Company had a right to transfer for the capital stock of another corporation; and the subsequent conduct of the Alice Company cannot deprive the Anaconda Company of the benefit of the transaction. This being true, it is equally plain that the Anaconda Company, as purchaser, after the completion of the transaction, had no power to control the Alice Company in its disposition of the proceeds of the sale, and was not concerned with the disposition to be made of the stock by that Company. It is very true that the Anaconda Company was bound to take notice of the charter and statutory powers of the Alice Company; it is equally true that it was not bound to inquire further. Under the statute and the charter, and under the financial condition of the Alice Company, it having power to transfer its property, and under the law having power, under certain circumstances, to transfer it for stock the Anaconda Company was not bound to inquire what were the plans of the Alice Company or its officers with reference to the disposition of that stock, and is not to be held culpable because the Alice Company might

fail to dispose of said stock in a proper and legal manner. On the contrary, there being a legal method by which the Alice Company could dispose of the stock,—that is, by dissolution and liquidation, the presumption was that it would follow that lawful path. It certainly was not *ultra vires* for the Alice Company, under certain conditions, to sell its property for stock. There being a plain legal course which the Alice Company could have followed by selling its property and taking in exchange for the same the capital stock of the Anaconda Company, the transaction thus far was clearly *intra vires*, and certainly because the Alice Company did not follow, or did not intend to follow the law in its subsequent conduct, the sale cannot, for that reason, be now rescinded. Much less can it be rescinded upon the suit of dissenting stockholders of the Alice Company who, by their conduct, have prevented the Alice Company from making legal and proper disposition of the stock received by it and of its assets. It certainly would be a very strange rule of law, and one unrecognized by the authorities, to permit a dissenting stockholder of the Alice to prevent, by legal proceedings, the constituted authorities and stockholders of that Company from converting the Anaconda stock into cash, dissolving the Company and distributing the proceeds thereof to the stockholders, and then, after having so prevented the Alice Company from taking legal corporate action in this regard, impute the wrong of the Alice Company to the Anaconda Company and rescind an executed con-

tract and a sale of property on that account. The contract having been fully executed, the stock transferred to and received by the Alice Company, neither party, nor anyone on behalf of either, can disturb the statu quo.

The rule even upon strictly ultra vires contracts, where the contract has been fully performed, by payment and a conveyance and transfer, is stated in Clark & Marshall on Private Corporations, page 554, as follows:

“CONVEYANCE OR TRANSFER TO CORPORATION.—If a corporation enters into an ultra vires contract to purchase property, real or personal, and the contract is fully performed by payment and a conveyance or transfer of the title, the effect of the transaction is to vest the title in the corporation, at least as against all persons but the state, and the corporation may afterwards sell the same. The other party cannot, in such a case, maintain a suit to rescind the sale and recover the property. Where a corporation purchases a note, and the note is transferred to it, the title passes, and it may maintain an action thereon against the maker and endorsers.

“CONVEYANCE OR TRANSFER BY CORPORATION.—The same is true of a contract by a corporation to sell property, real or personal, which is fully executed. The title to the property passes by the conveyance or transfer, and the corporation cannot maintain a suit to rescind and to recover the property.”

Also see cases cited under this section.

In the case of Holmes and Griggs Company against Metal Company, decision by the New York Court of Appeals, found in 24 American State Reports page 452, the court said in part:

"The plaintiff has sold its rolling-mill, machinery, etc., to the defendant. It has taken stock in the latter company in payment therefor. Inasmuch as this was done with the consent of all of the stockholders, it being the act of a private corporation, not in any manner harming the public, we see no reason for condemning its title to the stock so obtained; *Palmer v. Cypress Hill Cemetery*, 122 N. Y., 429-435.

"But assuming the transaction to have been ultra vires, the defenses interposed would still be unavailable. The plaintiff has the stock and has paid for it. It can not be recovered back by the defendant, for the transaction is completed and closed. Whilst the contract remained executory, if it was unauthorized, a stockholder or person interested might have interfered by injunction, and prevented the transfer of the property of the plaintiff to the defendant. But the contract having become executed, the title of the stock now vests in the plaintiff, and it has the power to sell and dispose of the same: *Sisters v. Best*, 88 N. Y., 526-543; *Millbank v. New York etc. R. R. Co.*, 64 How. Pr. 20."

Also see:

Miller v. Fleming & Fox Co., supra, 59 S. W., 512.

Also see decision in our own Circuit in the case of *U. S. Saving & Loan Co. v. Convent of St. Rose*, 135 Fed., 136.

Thompson on Corporations, Section 6016;
 Railroad Co. v. Johnson, 58 Kas., 175, 48 Pac.,
 847;
 Bowman v. Foster & Logan Hdwe. Co., 94 Fed.,
 592;
 Union National Bank of St. Louis v. Mathews,
 98 U. S. 621.

In fact, the rule as laid down by the foregoing and other cases is much stronger than is necessary to contend for in this case, for it is well settled that where the contract is executed, the consideration has passed and the conveyance made, the corporation is estopped from questioning it, although the transaction was absolutely ultra vires. In the present case the action, while brought by minority stockholders, is the action of the corporation, the Alice Company, and if the Alice Company could not raise the question as to the transaction being ultra vires because of the consideration being capital stock, the same restriction applies to the action although brought in the name of minority stockholders.

THE SHERMAN ANTI-TRUST LAW.

I.

THE SHERMAN ANTI-TRUST LAW CANNOT BE INVOKED BY STOCKHOLDERS OF A SELLING CORPORATION TO RESCIND AN EXECUTED SALE UPON THE GROUND THAT THE BUYING CORPORATION EXISTS IN CONTRAVENTION OF THE SHERMAN ANTI-TRUST LAW.

The Sherman Anti-Trust Law provides its own penalties in Sections 4, 5 and 6 as follows:

- (a) A criminal prosecution;
- (b) A suit by the United States, conducted by the District Attorneys and Attorney General to restrain violations of the same;;
- (c) The forfeiture of property in transportation;
- (d) A suit at law for treble damages by an individual injured.

The only remedy that may be invoked by an individual injured, whether such individual be a stockholder in a corporation and bring the suit in behalf of such corporation, or is acting upon his own account, is that provided for in Section 7,—a suit for treble damages. Injunctive or equitable relief of any character, for conduct contravening the Act, must be sought by the United States through its proper officers.

It is clear upon the authorities that such a suit may not be even brought under the circumstances of this case to prevent threatened action, and if such be not so, much less may such a suit be brought to set aside and rescind a completed sale, as is the subject of the present bill of complaint. We believe the multitude of authorities, including the Supreme Court of the United States, sets this matter at rest.

Wilder Mfg. Co. v. Corn Products Refining
Co., 236 U. S. 165; 59 Law Ed. 521;
Boyd v. New York & H. R. Co., 220 Fed., 179;

Corey, et al. v. Independent Ice Co., 207 Fed., 459;
 Metcalf v. American Furniture Co., 122 Fed., 116;
 Gulf C. & S. Ry. Co. v. Miami Co., 86 Fed., 207;
 Pidcock v. Harrington, et al., 64 Fed., 821;
 Ames v. Am. Tel. & Telegraph Co., 166 Fed., 820;
 Greer Mills & Co. v. Stroller, 77 Fed., 2;
 Blindell, et al. v. Hagan, 54 Fed., 41;
 Sou. Ind. Express Co. v. U. S. Express Co., 88 Fed., 660;
 Block v. Standard Distilling & Distributing Co., 95 Fed. 979.

The Metcalf case, *supra*, may be quoted from as illustrative of the rulings made by the other Federal Courts upon the various circuits. It is directly in point. The case was first considered by the District Court and reported in 108 Fed., 909. Upon demurrer, the demurrer was sustained for multifariousness. Upon amendment of the bill, the case was reconsidered. In the first decision, by implication, it was held that such a suit could be maintained by dissenting stockholders under the Sherman Act, but in this case, that conclusion is expressly overruled and denied.

This was a suit brought by a dissenting stockholder against the grantor and grantee *to compel a reconveyance of property which it was charged had been conveyed by the grantor through the wrongful act of its officers and stockholders to the grantee, for the purpose of*

monopoly, and in violation of the Sherman Anti-Trust Act. It is therefore on all fours with the case at bar.

The allegations of the complaint are disclosed in the following:

“The averments of the bill, however, charge the commission of unlawful acts by the directors, in conjunction with the American Company, with the view of injuring the Buffalo Company. The gist of the bill is a conspiracy to injure the corporation of which plaintiff and her associates are minority stockholders. It is set forth in the bill that the corporation has sustained irreparable injury and loss because of such conspiracy existing between the directors of the Buffalo Company and the American Company; that the conspiracy was conceived with the intent to absorb the property of the Buffalo Company, and to pay therefor a sum grossly less than the actual value; and, further, that the object of the conspiracy was and is to promote *an illegal confederacy to restrain trade and commerce and to create a monopoly*. The bill further sets forth that the intent and purpose of the conspiracy was and is to increase and control the price of school furniture in the several states and territories. The bill charges that the consideration of the transfer was secret, that a portion was retained by the directors as a secret profit, and that a price far less than the actual value of the assets of the Buffalo Company was accepted. A portion only of the consideration was paid in cash; the balance being stock in the American Company, which is alleged to be entirely valueless. The entire capital stock of the Buffalo Company, which was organized for the manufacture and sale of school furniture, is divided into 3,500 shares, of the par value of \$100.00 each. At paragraph 8 the bill substantially alleges that the American Company was capitalized for \$10,000,000.00, all of which was issued for property to the owners of and dealers in school furniture who

joined the unlawful combination in restraint of trade, and that such stock was approximately only of the value of \$3,000,00.00. One Million Dollars were borrowed to pay the secret profit to the promoters of the illegal combination.”

On page 126, the Court said:

“I do not understand that it is claimed by complainant that this court has the power to take cognizance of the alleged illegal combination because of the provisions of the anti-trust act of 1890. *It has been many times decided, and no longer admits of any question or doubt, that the only party entitled to maintain a bill in equity for injunctive relief for violating the provisions of the anti-trust act is the United States Attorney, at the instance of the Attorney-General.*”

If any doubt existed upon these questions, we think the same has been removed entirely by the decision of the Supreme Court of the United States in the Wilder Manufacturing Company case, *supra*, decided February 23, 1915, where the subject is very thoroughly discussed by Mr. Chief Justice White, and his conclusions concurred in by the entire court. Among other things, the Court said:

“ * * * In the second place, the proposition is repugnant to the anti-trust act. Beyond question, re-expressing what was ancient or existing, and embodying that which it was deemed wise to newly enact, the anti-trust act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same. *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed.

619, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912 D, 734; *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663, 31 Sup. Ct. Rep. 632. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions. Thus the statute expressly cast upon the Attorney-General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts, under his authority and direction, to act concerning any violations of the law. And in addition, evidently contemplating that the official unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the circuit court of the United States with 'jurisdiction to prevent and restrain violations of this act,' and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary, and to exert such remedies as would fully accomplish the purposes intended. Act of July 2, 1890, Chap. 647, 26 Stat. at L. 209, Comp. Stat. 1913, Sec. 8820.

"It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a two-fold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy

can be only that which the statute prescribes.' *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 35, 23 L. Ed. 196, 199; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. Ed. 212; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. Ed. 580; *Stephens v. Monongahela Nat. Bank*, 111 U. S. 197, 28 L. Ed. 399, 4 Sup. Ct. Rep. 336; *Tennessee Coal, I. & R. Co. v. George*, 233 U. S. 354, 359, 58 L. Ed. 997, 999, L. R. A. 1915, 34 Sup. Ct. Rep. 587; Second, because of the destruction of the powers conferred by the statute, and the frustration of the remedies which it creates, which would obviously result from admitting the right of an individual, as a means of defense to a suit brought against him on his individual and otherwise inherently legal contract, to assert that the corporation or combination suing had no legal existence in contemplation of the anti-trust act. This is apparent since the power given by the statute to the Attorney General is inconsistent with the existence of the right of an individual to independently act, since the purpose of the statute was where a combination or organization was found to be illegally existing to put an end to such illegal existence for all purposes, and thus protect the whole public,—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale, and yet be held to be civilly dead for the purpose of recovering the price of such sale, and then, by a failure to provide against its future exertion of power, be recognized as virtually resurrected and in possession of authority to violate the law. And in a twofold sense these considerations so clearly demonstrate the conflict between the statute and the right now asserted under it as to render it unnecessary to pursue that subject further. In the first place, because they show in addition how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States,—a jurisdiction evidently given,

as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting from such finding. In the second place, because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale, but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility, and not to leave it to individual action, prompted, it may be, by purely selfish motives.

“As, from these considerations, it results not only that there is no support afforded to the proposition that the anti-trust act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but, on the contrary, that the provisions of the act add cogency to the principles of general law on the subject, and therefore make more imperative the duty not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view and come to the only remaining inquiry, the alleged effect of the previous ruling in the *Continental Wall Paper* case, *supra*.”

Against this array of authorities, there is only the case of *Bigelow v. Calumet, etc. Co.*, which indulges in a serious discussion of the question to the contrary. After demonstrating by a review of the authorities, the doctrine we contend for, the District Court held to the contrary.

The decision was principally based upon the case of *Metcalf v. American Furinture Co.*, 108 Federal, 909, which was reconsidered in 122 Federal, 116, and the rule announced to be as we contend, as is shown by the excerpts from said case hereinbefore set out. The *Bigelow* case, has been both expressly and impliedly overruled by most other courts, including that of the Supreme Court of the United States. The facts of that case were entirely different from the case we are now considering, so much so that even if the decision were correct it could not be held to be controlling here. The point was neither made nor discussed, in the *Bigelow* case, in the Circuit Court of Appeals.

If the stockholder or individual may not, when thus injured, maintain a suit for injunctive relief, much less may he maintain a suit for other equitable relief, such as that sought in this action.

The gist of this action is the rescission of the sale of the Alice properties to the Anaconda Copper Mining Company, the cancellation of the deeds of conveyance, and reconveyance of the stock and property from one to the other, all of which is equitable in its nature, and comprehends a redress for the violation of the anti-trust law, which does not fall within any of the terms of the remedies provided for therein. The relief here sought is grounded squarely upon the Sherman Anti-Trust Act, and the remedies therein provided, and if it cannot be obtained upon the ground upon which it is sought, it may not be obtained at all.

Thus far we have discussed the question of the right of an individual or stockholder to equitable relief under the Sherman Anti-Trust Law, either before or after the consummation of the act complained of, and the authorities which we have cited necessarily support the proposition which we are now to discuss more fully, that after the consummation of the transaction, and the execution of the contract, dissenting stockholders of the Alice Company cannot maintain a suit to compel re-conveyances, and rescind and cancel title deeds, for the reason that the purchase of the property of the Alice Company by the Anaconda Company was for the purpose, entertained by the buyer, of restraining trade or monopolizing the copper industry.

Whatever may be said of the right of a stockholder of the buying Company to prevent, by injunction, a purchase by his own Company, violative of the Sherman law and with the intent to monopolize interstate trade and commerce, we hold it to be beyond any known principle to permit either the selling corporation or a stockholder thereof to undo a completed transaction upon the ground that it had its inception in a purpose entertained by the buyer, which contravened public policy.

The present suit is a suit by stockholders on behalf of the Alice Company. If it might not be maintained by the Alice Company, upon the ground stated, it may not be maintained by stockholders thereof.

This is clearly demonstrated by the equity rules of this court, which expressly provide that before a stockholder may maintain a suit in behalf of the corporation, he must make every reasonable effort to secure the suit to be brought by the corporation. If a stockholder might, on behalf of the corporation, maintain a suit which the corporation itself could not maintain, then a demand upon the corporation to bring a suit which it cannot maintain would simply be an idle performance, not required by any rule of equity.

The sale of this property by the Alice Company to even a known trust was not *ultra vires*, for the Alice Company had a right to sell its property. It was not immoral, neither was it illegal, because there is no law prohibiting the sale of property to a corporation or an individual whose business may be conducted in restraint of interstate commerce.

Such sale upon the part of the Alice Company was not void on account of the alleged trust character of the purchaser, neither was the title vested in the purchaser void on account of its alleged trust character; neither was it voidable at the suit of any one whomsoever, except the Government of the United States.

Indeed, the policy of disturbing as little as possible the property and property rights of unlawful combinations, has numerous times been approved by the Supreme Court of the United States. In *American Tobacco Company*, 221 U. S., page 185, in speaking of the

principles which should be kept in view in rectifying the unlawful conditions which existed, the court stated one of those to be a "proper regard of the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning."

Assuming the sale to have been for a fair price, and that must be assumed, when considering complainants' cause of action upon the sole ground of a violation of the anti-trust act, neither the Alice Company nor any stockholder was injured in the least by the sale of the property to the Anaconda Company, though a trust, neither was it or they subjected to any penalties whatsoever.

If indeed, the case has shown that there was such a unity of interest between the Anaconda Copper Mining Company and the Alice Company, or such a common directorate, as to avoid the sale unless it was for full value and absolutely fair, this question must be dealt with independently of the allegations in reference to the Sherman Anti-Trust Act and under the proper subdivisions of complainants' bill.

The authorities abundantly affirm the doctrine, that after a transaction contrary to public policy, is consum-

mated, it may not upon that ground be rescinded, but the law will leave the parties in exactly the position in which they had placed themselves, *and the law implies a contract between the parties which is enforceable, that neither will attempt to undo that which has already been done.*

Boyd v. New York & H. R. Co., 220 Fed., 179;
Wilder, etc. v. Corn Products, etc., 236 U. S.,
165;

Metcalf v. Am. Furn. Co., 122 Fed., 116;

Camors-McConnell Co. v. McConnell, 140
Fed., 415;

Conley v. Union Sewer Pipe Co., 184 U. S.
547;

Santa Cruz v. Wykes, 202 Fed. 372;

Houston, etc. v. Texas, 44 U. S. Law Edition
688.

The Boyd case, *supra*, was a suit brought for the purpose of undoing certain contracts and avoiding certain executed conveyances claimed to be in contravention of the Sherman Anti-Trust law, as well as for preventive relief against future wrongs. The court said:

“If the lease of 1873 created a control or unity of competing interests forbidden by the Sherman Act, the fact that such obnoxious arrangements long antedated that statute does not render the act inapplicable.

“Complainants, however, have no standing to demand in this private litigation the abrogation of the lease, the restoration of the status of 1873, nor the sale by the Central of its Harlem stock. Such efforts are a usurpation of the functions of the executive; it does not lie in the power of private citizens to assume at will the duties of an Attorney

General. (This was suit by stockholders). Actions thus privately brought would be even more privately settled. The certain scandal and endless confusion resulting from such freedom of action are the sufficient reasons for cases like *National Fireproofing Co. v. Mason*, 169 Fed. 259."

The Metcalf case, *supra*, is exactly analagous, as we have hereinbefore pointed out upon the facts, to the one we are now discussing. The exact situation now being canvassed was therein presented, and among other things it was said:

"The contract to purchase the plant of the Buffalo Company, in view of the determination of that Company to dissolve and discontinue business, was an enforceable contract. The American Company could not refuse to pay for the property bought, because of an asserted illegal combination; nor could the Buffalo Company refuse to convey after agreeing to do so. Such being the status of the vendor and vendee, complainant must be relegated to another remedy than that which she pursues for a vindication of any wrongs or damages sustained by her at the hands of the directors. As already stated, no fraud in the management of the corporation or in the action of the majority stockholders is asserted in the bill, except inferentially, from the general charge of conspiracy to stifle competition in trade. The complainant could not prevent or control the lawful management of the affairs of the corporation, nor the discretion exercised in the sale of the property, unless it appears that such acts were *ultra vires* or in fraud of complainants' rights. The pleadings do not disclose such facts. Nor can the Company equitably rescind the sale because of any secret profit by the directors, or owing to their acceptance of an inadequate consideration. * *

* In referring next to the actual transfer and its effect, it must not be overlooked that this was an executed contract. * * * All prior transactions leading to a sale of the property and a dissolution of the corporation were ratified by a positive majority of the stockholders on March 2, 1899. Having in mind the legal distinction between the right which the corporation possesses to rescind a contract on account of fraud and by reason of acts claimed to be ultra vires, how can it be insisted that the solemn contract made between the Buffalo Company and the American Company should be set aside, after it had become executed, in obedience to the behest of the complainant. Her right, as heretofore stated, is not enlarged beyond that of the corporation. Her status is accordingly narrow and circumscribed. Title to property and its possession having passed to the grantee, the corporation is estopped from seeking a rescission of its contract. *A stockholder standing in the shoes of the corporation likewise is estopped from asserting the invalidity of such an act.* A court of equity would undoubtedly, at the suit of a stockholder, enjoin a threatened act by the corporation beyond its granted powers. But it is strenuously urged by complainant that the ultra vires acts invalidated the contract of sale. I think the weight of authority is against an interpretation of the doctrine of ultra vires as claimed by complainant. * * * 'It is a principle of universal application that whenever an illegal, immoral, or prohibited contract has been duly executed on both sides, the law will not lend its aid to either of the parties for the purpose of unraveling it and enabling him to recover what he may have lost through it.' In such cases the governing maxim is, 'In pari delicto potior est conditio defendentis'. When therefore, a contract with a corporation, the making of which is beyond its granted powers, has been duly executed by both parties, neither of them can assert its invalidity as a ground of relief against it."

In *Diamond Match Co. v. Kover*, 106 N. Y., 374, the court said:

"We are not aware of any rule or law which makes the motive of the covenantee the test of the validity of such a contract; on the contrary, we supposed a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by the consideration, will depend upon the reasonableness as between the parties."

Nowhere in the act is it provided that the acquisition of property by illegal combinations shall be, by reason of such fact, void, nor that any penalty shall be visited upon the corporation by the taking away of that property from it, unless, indeed, such may be done at a suit of the United States for the purpose of dissolving a monopoly, and then the property is only distributed in such a way as to prevent the monopolizing influences, and is never in any event given back to the purchaser.

Even admitting the sale of the property by the Alice Company to the Anaconda Company to have been in contravention of public policy, the wrong related to the public, and after the sale was completed, no injury, either in person or in property rights, arose which could be redressed by a suit either of the Alice Company or its stockholders.

As stated in *Wilder Mfg. Co.*, *supra*, by Mr. Chief Justice White, the injury intended to be prevented is a public injury, and agencies have been provided therein for its redress. Whatever ethical standards the complainants, stockholders, may have erected for them-

selves in relation to the propriety of the sale of the Alice property to a claimed trust or illegal combination, courts of equity cannot give effect thereto. High ideals are commendable, but when dissociated from personal or property wrongs to the complaining parties, violation of the same is not actionable.

In the case of *Santa Cruz v. Wykes*, *supra*, in discussing the question of the rescission of executed contracts made *ultra vires*, this court said:

“The principle applies not as an estoppel to the corporation, where the *ultra vires* contract is still executory, to set up its incapacity to entertain it; but where the contract has been executed—that is, fully and completely performed on both sides—the court will not interpose to restore either party his former estate, or grant other relief, but will leave the parties where it found them. * * * But in a much earlier case the doctrine is affirmed that though an illegal contract will not be enforced by the courts, yet where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied and the transaction will not be unraveled for the ascertainment of its origin.”

In the case of *Houston & T. C. Ry. Co. v. Texas*, U. S. 44 Law Ed., foot page 688, wherein the Supreme Court of the United States was discussing the rescission of a contract entered into in violation of law and in contravention of public policy, it was said:

“After the complete execution of the transaction, it must be that each party thereupon and at

once, becomes possessed of certain legal rights arising from its performance. Neither party could undo what had been fully executed and completed, and the law therefore implies a contract, that neither party will attempt to do so; or, in other words, the law implies a contract that the payments made shall not be thereafter repudiated or denied. Any subsequent statute of the state, which repudiated or permitted the repudiation of the payments, would impair the obligations of the contract which the law raises from the transaction itself."

See also *Long v. Georgia Pacific Railway Company*, 91 Ala. 519;

Illinois Trust & Savings Bank v. Pacific Railway Company, 117 Cal., 332;

Planters' Bank v. Union Bank, 16 Wallace, 500.

But why pursue the subject? There is no contrariety or dissent in the authorities. This case falls within none of the exceptions or modifications of the rule. Clearly the Alice Company could not be granted relief in this suit. The plaintiff stockholders sue in a representative capacity. They do not sue as beneficiaries. Suing in a representative capacity, they cannot have relief on behalf of the Company, which the company could not obtain upon its own behalf.

While this case does not proceed upon any common law theory, but is grounded wholly, as hereinbefore pointed out, upon the anti-trust act, it may not be impertinent to say that laying aside the anti-trust act, a

stockholder could not, at common law, under circumstances of this character, maintain a suit to rescind the sale.

A very full and learned discussion of this question may be found in *Metcalf v. American Furniture Co.*, 122 Fed. 116, cited *supra*, and hereinbefore quoted from at length.

From this case, and the authorities cited, it will be observed that no suit would lie at the common law under circumstances of this character on behalf of a stockholder to rescind the sale, and for like reasons the sale cannot be rescinded under the Sherman Anti-Trust Act.

II.

THE PURCHASE OF THE ALICE PROPERTIES WOULD NOT TEND TO EFFECTUATE ANY ILLEGAL PURPOSE TO MONOPOLIZE INTERSTATE COMMERCE IN COPPER, AS ALLEGED IN COMPLAINANTS' BILL, AND WOULD THEREFORE NEITHER BE ILLEGAL NOR AGAINST PUBLIC POLICY.

The allegations contained in complainants' bill, and whatever proof they had, was directed to establishing that the Amalgamated Copper Company was formed with the purpose of monopolizing commerce in copper, and that the acquisition of the Alice properties was in the pursuit of such purpose. The undisputed evidence is that the Alice properties never were, and are not,

copper producing. A great amount of development work has been performed upon the properties, and very large amounts of ore taken therefrom, the product of which has always been silver and gold and zinc. If any copper whatever is contained in the ores, its value is entirely negligible. Even its *situs* would not lead to any reasonable probability that any expenditures, however large, would result in its becoming copper producing. It is not within reasonable proximity to the copper zone, and practically all other properties upon the same lode have produced silver and gold and zinc. It clearly appears from the testimony of all who testified upon the point that it was its prospective zinc and silver values which induced the purchase, and that at the most the purchase was only speculative, and its future value entirely dependent upon the development of future processes adapted to the treatment of zinc ores of the character contained therein. Even though the purchasers may have entertained a hope, under such circumstances, that copper might subsequently be found in the properties, the conclusion of the court cannot be based upon the same. Since then the productive power of the properties has been limited to metals other than copper, and it is apparent that the acquisition of these properties would not tend in the least to effectuate the evil purposes charged against the Amalgamated Copper Company in this suit, and not tending towards monopoly in this designated metal, the purchase would be entirely legal and not contrary to public policy, and certainly not inhibited by any provision of the anti-trust

act. Not only this, but the acquisition of the property would be entirely collateral to the evil purposes charged against the wrongdoer; being collateral to such evil purposes, the law recognizes such a purchase as being free from any vice whatever, and it will not only sustain the same after the transfer has been accomplished, but if a contract of purchase existed between the parties which was entirely executory, specific performance would compel a compliance therewith. This is distinctly ruled, as we take it, in *Connolly v. Union Sewer Pipe Company*, *supra*, and the general principles will be found discussed in

Section 355, *Moore on Interstate Commerce*, and standing alone, this one proposition would, in our judgment, and must necessarily, defeat the plaintiff's claim that the sale of these properties ought to be rescinded because violative of the Sherman Anti-Trust Act, in that they tend to a monopoly in the copper commerce of the country.

III.

NEITHER THE AMALGAMATED COPPER COMPANY NOR THE ANACONDA COPPER MINING COMPANY WAS AT THE TIME OF THE PURCHASE OF THE ALICE PROPERTIES, NEITHER HAD THEY EVER BEEN, ILLEGAL COMBINATIONS IN RESTRAINT OF INTER-STATE COMMERCE, AND THE ANACONDA COMPANY, UNDER THE CIRCUMSTANCES

DISCLOSED IN THIS CASE, HAD THE LEGAL RIGHT TO ACQUIRE THE ALICE PROPERTIES FOR THE PURPOSES AND IN THE MANNER IN WHICH THEY WERE ACQUIRED.

In approaching this subject, it is necessary to inquire somewhat into the allegations of complainants' bill, and to discover whether or not these allegations are sustained by the proof.

Aside from the allegation that in the year 1899 certain individuals, with a view among other things, to control the production of copper and the supply thereof, and to fix and regulate the price thereof in the markets of the world, and to suppress competition in the sale thereof, organized the Amalgamated Copper Company, or caused the same to be organized, no essential material controverted allegation of complainants' bill has been supported by any evidence whatever. The allegation as to the intent with which the Amalgamated was organized is supported only to a limited extent by the testimony of Lawson, given under circumstances and in a manner which discredit it, and which is fully contradicted by the testimony of Burrage, as well as by fifteen years of unimpeachable conduct upon the part of the Amalgamated. All other material allegations controverted in this case have not only no testimony to support them on the part of the complainants, but are emphatically disproved by uncontradicted and credible testimony.

There is no testimony whatever tending to establish

the allegation that the acquisitions of the Amalgamated of the stocks of the various mining companies in Butte were for the purpose of monopolizing interstate trade in copper products; neither is there any proof that in the year 1910, with such illegal purpose, and more effectually to carry the same out, the Amalgamated deemed it advisable for the Anaconda to become invested with the physical properties and with the title to the same, or to all the properties which, by development or operation, might give rise to any competition in the production or sale of copper. Neither is there any proof that the Amalgamated, in association with the Anaconda Company, for a like purpose, purchased the Clark properties. On the contrary, the proof distinctly shows that such was not the purpose. Neither is there any proof that the Amalgamated, with any evil purpose, or otherwise or at all, caused the Butte Coalition Company to be organized, or that it ever held a majority or controlling interest in said Company. On the contrary, the proof is positive that neither the Amalgamated nor the Anaconda had anything whatever to do with the organization of Butte Coalition, and that Amalgamated never at any time owned to exceed 50,000 shares of an issued capital stock of 1,000,000 shares, in said Company.

Neither is there any proof that the Amalgamated or the Anaconda Company ever caused the Butte Coalition Company to acquire a majority of the stock of the Alice Company.

Neither is there any proof that the Amalgamated or Anaconda, prior to the year 1910, controlled and dominated the business and affairs of the Alice Gold and Silver Mining Company, or elected boards of directors of the Alice Company, or that they were ever in possession of the said Alice Gold and Silver Mining Company.

Neither is there any proof that the Amalgamated or the Anaconda Company caused a meeting of the stockholders of the Alice Company to be held for the purpose of transferring the properties of the Alice to the Anaconda, or that they, or either of them, controlled the meeting of such stockholders. Neither is there any proof that the directors of the Alice Company acted under the direction or control of either the Amalgamated or Anaconda, but on the contrary the testimony shows that if any influence whatever was exercised over the Alice Company, its stockholders and directors, it was the influence which the Butte Coalition legitimately exercised by virtue of its ownership of a majority of the stock of that company; that the Butte Coalition Company was not related in any way, or in the least, under the legal domination of either the Amalgamated or the Anaconda, and that at no time did either of said companies own more than one-twentieth of the total issued capital stock of said Butte Coalition Company.

Thus understood, the sole question is here presented whether this sale may be avoided by stockholders of the

Alice Company on account of the relations existing between the Amalgamated Company and the Anaconda Company, such Amalgamated Company owning a majority of the stock of the Anaconda Company, the Anaconda Company being the purchaser; on account of the alleged trust character of the Amalgamated Company itself, claimed to have arisen out of the magnitude of its investments in the stock of Butte mining companies, and a claimed intention of its promoters, existing in 1899, to control the production and price of copper.

We do not understand the complainants, either by allegation or proof, to assert that either the Anaconda Company or the Amalgamated Company have ever restrained interstate trade in copper, or that they have ever, in the legal sense, monopolized the copper business in the United States, or, so far as commerce therein is concerned, between any of its states. Neither do they claim that either of said companies has ever brought about any of the evils against which the Sherman Anti-Trust Law is directed, and which are tersely stated in the Standard Oil case to be:

- (a) Raise the prices to the consumers of the articles they affect;
- (b) Limit their production;
- (c) Deteriorate their quality.

But we understand it to be claimed that the Anaconda Company, by its acquisition of mining properties in the Butte District, and the Amalgamated Company

by its control of the majority of the stock of the Anaconda Company at the time of the acquisition of the Alice properties, had the *power* to restrain competition in copper products, and that such power alone rendered them inimical to the law in question. Complainants' position can be better stated in the language of their brief. By devious reasoning and inapposite authorities, they reach the following conclusion:

"If a combination tends to defeat competition, it is unlawful. Such was the character of the combination which has been the subject of this study."
(Appellants' brief, page 139.)

A new phase indeed, and wholly inadequate as a definition of a combination rendered illegal by the anti-trust law; and a phrase which we venture to assert has never received deliberate judicial approval, and which does not measure to the standard established by the decisions of the Supreme Court of the United States. That it omits many elements which must be included before a combination becomes obnoxious, and that it is incorrect is clearly disclosed in many cases, including the Du Pont case, 108 Federal, 127, from which we quote the language of the Circuit Court of Appeals, written by Judge Lanning, and concurred in by Judges Gray and Buggington:

"A number of bills were introduced in the Fiftieth Congress (in August and September, 1888) designed to make unlawful every combination 'to prevent competition' and 'to prevent full and free competition' in the sales of articles transported from one state to another. None of them was en-

acted into law. On December 4, 1889, Mr. Sherman introduced into the Senate of the Fifty-first Congress a bill which declared unlawful every combination 'to prevent full and free competition' in such sales. After much debate the bill was, on March 27, 1890, referred to the Committee on Judiciary, and on April 2, 1890, that Committee reported to the Senate with an amendment, drawn by the late Senator Hoar, striking out all after its enacting clause and substituting therefor the act as we now have it. As enacted, it does not condemn every combination 'to prevent competition.' What it condemns is every combination in restraint of trade or commerce among the several states, etc. When the bill went from the Senate to the House, the latter body amended it by inserting a provision extending the scope of the act to all agreements entered into for the purpose of 'preventing competition' either in the purchase or sale of commodities, but the amendment was disagreed to. While there is a 'general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body' (*United States v. Freight Association*, 166 U. S. 318, 17 Sup. Ct. 540, 41 L. ed. 1007), that rule 'in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted' (*Standard Oil Co. v. United States*, 221 U. S. 50, 31 Sup. Ct. 512, 55 L. ed. 619 (34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734), decided May 15, 1911).

"There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the Anti-Trust Act was passed, a definite legal signification. Not every combination in restraint of competition was, in a legal sense, in restraint of trade. Two men in the same town en-

gaged in the same business as competitors may unite in a copartnership, and thereafter, as between themselves, substitute co-operation for competition. Their combination restrains competition, and if their town is located near the line between two states, and each has been trading in both states, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several states.' To what extent the Anti-Trust Act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely or incidentally restrain interstate trade.

"The recent decisions of the Supreme Court in *Standard Oil Co. v. United States*, and *American Tobacco Co. v. United States*, 221, U. S., 106, 31 Sup. Ct. 632, 55 L. Ed. 663, make it quite clear that the language of the Anti-Trust Act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the Anti-Trust Act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the

act there might have been restraint of competition that did not amount to a common-law restraint of trade. This fact was plainly recognized in *United States v. Joint Traffic Association*, 171 U. S. 505, 567, 19 Sup. Ct. 25, 31, 43 L. Ed. 259, where Mr. Justice Peckham said:

“ ‘We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, a manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within the legal definition of that term.’ ”

Ex-President Taft, in his work on “*The Anti-Trust Act and the Supreme Court*,” after a thorough study of the decisions of the Supreme Court in cases arising under the Anti-Trust Act, says:

“The effect of the cases is that a mere union of capital in the same branch of industry, for the purpose of promoting economy and efficiency, though it uses interstate commerce, and though to the extent of the business of the two firms or companies it suppresses the competition of each against the other, is not within the statute unless what is done necessarily has the effect to control all the business or can be shown by the character of the acts to be intended to effect that purpose or to be a step in the plot to bring it about. Mere bigness is not

an evidence of violating the act. It is the purpose and necessary effect of controlling prices and putting the industry under the domination of one management that is within the statute." (Page 112.)

Again he says:

"The object of the anti-trust law was to suppress the abuses of business of the kind described. It was not to interfere with a great volume of capital which, concentrated under one organization, reduced the cost of production and made its profits thereby and took no advantage of its size by methods akin to duress to stifle competition with it. I wish to make this distinction as emphatic as possible, because I conceive that nothing could happen more destructive to the prosperity of this country than the loss of that great economy in production which has been and will be effected in all manufacturing lines by the employment of large capital under one management." (pp. 126-7.)

We apprehend that a prolonged discussion of the alleged trust character of the Amalgamated Copper Company, disassociated from the relations which it held to the Anaconda Company at the time of the transaction which resulted in the acquisition of the Alice property, will not, in view of the circumstances of this case, greatly aid the court in deciding the question at issue, for at the time of the acquisition of the Alice property, the Amalgamated had ceased to control, by stock ownership, the various Butte companies in which it originally purchased stock, for it will be remembered that all the property of such companies had been purchased outright by the Anaconda Company, and the relations of

the Amalgamated Company to the Anaconda Company were merely that of a majority stockholder in that company, subject to the same rights and privileges and responsibilities as any other majority stockholder in that company would be subject to, for transactions carried out by the Anaconda Company.

However, it may be said that at no time in the history of the Amalgamated Company did it, through its stock ownership, monopolize interstate commerce in copper, neither did it attempt to do so; neither did it ever have the *power* to do so. Neither does the evidence disclose that it was guilty of any act which was illegal, unlawful or indicated that it was either in effect or purpose an illegal combination under the Sherman anti-trust law.

Undoubtedly it was originally organized because it was believed that the acquisition of stocks in valuable mining properties would be a profitable business venture. Its ownership of these stocks never produced any of the evils against which the anti-trust law is directed. There is no evidence that it used its power to enhance the selling price of copper or to limit the production thereof, or to depreciate the quality of the product. The manner of its acquisition of the stocks of the several companies was wholly unobjectionable, and bears no indication of having been unfair or having been obtained by illegal practices. It does not appear that it ever interfered with the internal control of the several companies.

The aggregate of capital finally employed in the acquisition of these stocks was large. Much stress appears to be laid upon this point by complainants' counsel. Undoubtedly the stocks were worth what was paid for them, and they were paid for in cash. Figures are always relative; while large in the aggregate, this sum may have been, and doubtless was, small in proportion to the aggregate amount of capital which would have been required to have obtained a monopolistic control over the production of copper in the United States.

No inference of evil can therefore be drawn from the amount of capital invested.

Much space is allotted in argument to inquiries as to why the promoters of this company did not acquire and own individually the stocks that they desired, instead of forming a corporation for the ownership of the same. We have been utterly unable to grasp the materiality of the inquiry. The control of the promoters, by personal ownership of the stock, would have been as complete as that of the corporation by its ownership of the same. The corporation was entirely legal. Its right to purchase stock is undisputed. No inference of wrongdoing can be drawn from any act, however, performed, if the same is legal and embraces no evil purpose. Monopoly of individuals is as offensive as monopoly of corporations. It therefore appears to us wholly immaterial whether these stocks were held by individuals collectively or collectively by a corporation. It has been too often adjudged to be longer open to dispute, that the mere form which a combination takes is immaterial,

but that the law, ignoring forms, looks to the substance, purpose and the result of the prohibited act.

During the control of these companies by the Amalgamated, the production of copper from the Butte mines, instead of decreasing, constantly increased. The sales of the same increased. There was no stifling of either production or competition. Although this production increased, it did not increase in the same ratio as the production of the United States as a whole. That production almost doubled. And it must be said, that if there was any purpose in the promoters of the Amalgamated Copper Company, through it, to monopolize the copper industry in the United States, that Company proved ineffectual to carry out such purpose, and not having the power to do so, any intention of the original promoters in that regard has proven to be wholly immaterial.

At a time when these companies controlled by the Amalgamated Copper Company, produced proportionately more of the copper of the United States than they did in 1910, the Supreme Court of the State of Montana, in the case of *MacGinniss v. Boston and Montana*, 29 Montana, 428, had under review its alleged unlawful character. The question arose under the constitution of the State of Montana and our local law, designed to prevent trusts and combinations. It must be said that these laws reached all the evils designed to be prevented by the Sherman anti-trust law, insofar as

these evils affected the local situation. Indeed, our Constitution and statute are both more specific and broader in their provisions, if that were possible, than the law now under consideration.

(a) In that case it was held that a private individual could not undertake to enforce such laws, by a suit in equity; that this was the duty devolving upon the state.

(b) That the Amalgamated Copper Company had the right to acquire the stocks of the various companies which it acquired, provided that acquisition was not for the illegal purpose of restraining trade; in other words, that there must be an evil intent in the acquisition that it will result and is for the purpose of contravening the statute and the constitutional provisions.

(c) The Amalgamated Copper Company had done nothing which would indicate any purpose to control commerce or to create a monopoly.

(d) That the mere possession of power upon the part of the Company to restrain trade, if it chooses to exercise it, is not sufficient to bring it within the punishments provided by law, and before it could be reached it must put that power into exercise.

We believe this decision not to be at variance with any controlling decision of the Courts of the United States, the same having been substantially held in many cases entirely analagous upon principle with this. But as we have above indicated, we believe that the situa-

tion of affairs, the relative position of the Anaconda Company in the copper world, the purpose, intent and effect of its acquisition of the Alice properties and other Butte properties, which it acquired in the year 1910, in connection with the relation borne to the Anaconda Company by the Amalgamated Company, which was at that time that of a majority stockholder, and the further fact that neither the Amalgamated nor the Anaconda Company, in the year 1910, had the power to monopolize, either geographically or distributively, interstate commerce, and that the acquisition of the Alice properties did not render the acquisition of such power dangerously probable, are the questions of concern in determining whether such acquisition was contrary to the Sherman Anti-Trust Law.

At that time, and for many years prior thereto, all the properties of all the companies formerly controlled by the Amalgamated Company, through stock ownership, and afterward acquired by the Anaconda Copper Mining Company, in which the Amalgamated Company owned a majority of the stock, and all other acquired properties, produced only about twenty-one per cent of the copper of the United States. The proportion produced by those companies of the whole in the United States had, for many years, decreased.

The acquisition of these properties by the Anaconda Company was an acquisition by purchase. True, they were not paid for in cash. We can hardly comprehend

that a transaction becomes abnormal or unusual, simply because the purchaser must borrow the money, or because the purchaser issues stock in payment therefor.

However, this is of little consequence in the ultimate resolution of this question. Certainly none of the evils of monopolies either followed or preceded the acquisition of the copper properties at Butte by the Anaconda Copper Mining Company, and this must be one of the controlling tests in determining whether the combination effected was an unreasonable combination in restraint of trade and commerce.

No control had been exercised over the price of copper to increase it to the consumer. There had been no limitation of production, for the production was constantly increasing. There had been no deterioration in the quality of the product; no censurable influences had been brought to bear upon competitors; wages and working conditions had constantly improved.

Neither the Amalgamated nor the Anaconda Company had acquired the preponderate position in the copper business, nor sufficient power to render their acquisition repugnant to the Sherman Anti-trust law, and the acquisition of the Alice properties did not render it dangerously probable that they would acquire such preponderate position, or if acquired, that they would use the same in violation thereof.

The controlling reasons, and that which induced these various acquisitions of property, are clearly set

out by the testimony in the record. They were substantially as follows:

(a) Very large economies in management and production; thus enabling weak companies to continue operation;

(b) The final settlement and adjustment, as between stockholders and companies with divergent interests, without litigation, all apex rights upon which the very life of several of the companies depended,—rights of similar difficulties and of similar natures, as those which had formerly caused the Butte operators to waste their substance in violent and destructive litigation, and thus obviating large expenditures to determine the respective rights in relation to these matters.

(c) The acquisition of new properties to prolong the life of the Anaconda Company and make up for ore depletions which were constantly occurring in the natural operation of the same. In this regard, it was immaterial whether such acquisitions produced copper, silver, gold or zinc, provided they resulted in profit and took the place of depleted ore reserves.

That these were the prime factors leading to all acquisitions by the Anaconda Company of properties in the Butte District is made clearly to appear from the testimony of C. F. Kelley, set out in the foregoing statement, subdivision IV, and that they were legitimate and proper, and that such acquisitions would, in the long run, tend not to restrain interstate commerce

in copper, but to facilitate the same, must be seen by anyone with a knowledge of the mining industry, and particularly anyone with a knowledge of mining events in the copper world.

Indeed, upon the results sought to be obtained by these acquisitions, would ultimately depend the very life of the mining industry in this state. For many years the general production in the United States has been rapidly increasing. Year after year the Butte properties produced less in proportion to the aggregate than formerly. Year after year, the demands for wages, and the expense of supplies and the requirements of improved mining conditions, have been enhancing the cost of production. Year after year the Butte mines have been growing deeper, and the ore reserves were becoming baser.

Mr. Gillie's testimony shows that with all the acquisitions of the Clark and Heinze properties, at the time the Alice properties were acquired the total ore reserves were not as great as they were in the several mining properties which were originally controlled through stock ownership by the Amalgamated Copper Company. (See Tp., Vol. 1, page 407). In the meantime, almost inexhaustible porphyry deposits had been developed in Utah, Nevada, Arizona and New Mexico, where the copper, instead of being taken from 3,000 feet beneath the surface of the earth, was being taken out by steam shovels, and which production it is a matter of current history and known to court as well as to

all, was much cheaper than the Butte District, and the amount of such production almost without limit.

Therefore, unless such economies could be brought about, and the life of the Butte mining camp extended, and apex controversies satisfactorily adjusted, it was inevitable that in the course of a few years the Butte district must cease to be a substantial competitor with the other copper companies of the United States.

Such being the purposes and objects of these acquisitions, and such purposes and objects being necessarily essential to the welfare of the companies, then any result, if any followed, tending to restrain interstate trade in this product would be indirect and not condemned by the Sherman law, and any restraint occurring therefrom would not be unreasonable according to the authorities.

We invite the Court's attention to *Bigelow v. Calumet & Hecla*, 155 Federal, 869; same case, 167 Federal, 704 (District Court); same case, Circuit Court of Appeals, page 721. On page 712, it was said:

"We are thus brought to the question whether the necessary effect of the alleged combination is to restrain trade or create a monopoly. It is settled that a combination does not violate the Federal Statute merely because it may indirectly, incidentally, or remotely restrain trade or tend toward monopoly. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law. On the other hand, if it only incidentally or indirectly restricts competition, while its main purpose and chief effect are to promote the business and in-

crease the trade of the consumers, it is not denounced or voided by that law."

In the opinion of the Circuit Court of Appeals, affirming this case, on page 725, it is said:

"It is therefore well settled that it does not apply to restraints or monopolies as such, but only to those which directly and immediately, or those which necessarily affect commerce among the states or with foreign nations. If the law were held applicable to contracts or combinations indirectly or remotely affecting such commerce, it would substantially obliterate the distinction between interstate and intrastate commerce."

Again:

"The power of stock control which the Calumet Company has acquired, may be exercised only in legitimate and lawful ways in the interest of economical management of both companies. In that case it has done nothing affecting commerce among the states. On the other hand, that power may be a mere preparation for the doing of acts which will directly and necessarily interfere with the freedom of that kind of commerce which it is the purpose of Congress to protect. When this unlawful use of the power shall result in an unlawful restraint, or further steps shall point to results directly affecting such commerce, there may be interference by the courts."

Again:

"In a very convincing opinion, the judge who heard the case below states the leading facts which made it desirable and economical that there should be, to a certain extent, a co-operation in future mining operations by the two companies, in order

that certain poorer lodes underlying the conglomerate lode of the Calumet Company, which has been worked to a point where exhaustion is in sight, may be worked to the best advantage of both companies. We shall not go into the details. We refer and adopt the conclusion stated by Judge Knappen: 'I am convinced, from a careful consideration of the testimony, that the controlling motive and purpose of the Calumet & Hecla Company in acquiring its interest in the mining properties mentioned, was to extend its industrial life, and keep up and increase, if possible, its production and net earnings, and that the evidence fairly negatives a design thereby to reduce the output of any of the companies or artificially to increase or maintain the price of the product, or to stifle competition between the related companies, or to prejudice other stockholders generally of either company associated, or to interfere with the integrity of either company, a common management with separate detailed organization being contemplated. The evidence does not indicate that any use of the facilities of the associated companies is contemplated, except upon terms and in manner mutually advantageous.' "

By reference to the first citation, 155 Federal, it will be disclosed that the issues in this case included not only a mere combination in production by a combination in the marketing and sale of the copper products in interstate commerce. The authority of the case is vigorously assailed by the appellants by the assertion that the same has been practically overruled, and it is said that the decision is grounded squarely upon the Knight case, which it is said has been modified to such an extent as to make it inapplicable. We say, however, that

the facts of the Bigelow case being analagous, and the reasoning of the several decisions sufficient to sustain the conclusion, that the fact, if it be such, that the Knight case was approvingly mentioned in the opinion and that it was not in all respects applicable, does not destroy the force of the precedent, and that enough remains in the argument to show, together with the authorities cited, that notwithstanding any misapplication of the Knight case to the facts of the Bigelow case, the decisions must necessarily have been the same.

In the Standard Oil case, the following from the case of *Hopkins v. United States*, was quoted with approval:

“To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act.”

The rule announced in the Standard Oil and Tobacco cases, that in order to be inhibited, the restraint accomplished must be unreasonable and undue, is the corollary of the rule in relation to direct and indirect effect, to which we have heretofore referred, and whichever principle is appealed to, both being substantially alike, the same result will be attained. In the Standard Oil case, the rule of unreasonable restraint is thus stated:

“Without going into detail and but very briefly surveying the whole field, it may be with accuracy

said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

After analyzing the statute, the court said:

"The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

"c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be

illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

Again it is said:

"In other-words, that freedom to contract was the essence of freedom of undue restraint on the right to contract."

The rule was further elucidated, and all obscurity entirely removed by its restatement in the case of *The United States v. American Tobacco Company*, wherein, on page 178, it is said:

"The obscurity and resulting uncertainty, however, is now but an abstraction because it has been removed by the consideration which we have given quite recently to the construction of the Anti-trust Act in the *Standard Oil* case. In that case it was held, without departing from any previous decision of the court that as the statute had not defined the words restraint of trade, it became necessary to construe those words, a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the pre-

vious decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions. (Citing cases.) That such view was a mistaken one was fully pointed out in the Standard Oil case and is additionally shown by a passage in the opinion in the Joint Traffic Case as follows (171 U. S. 568): 'The Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing on interstate commerce, and possibly to restrain it.' Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term restraint required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free

movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us."

In reference to the similarity of the rules, in reference to direct and indirect results, and legal and proper intents and purposes, as distinguished from those which are illegal and improper, and the rule in reference to reasonable and unreasonable restraints, in the Standard Oil case, it was said:

"If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be ap-

plied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all."

Applying therefore to the facts of the acquisition of the properties of the several mining companies in Butte by the Anaconda Copper Mining Company, the rules hereinbefore stated, it becomes immediately apparent that such acquisition did not amount to a violation of the Sherman Act. Neither did it, nor could it, result in an undue or unreasonable restraint of trade as that term is legally understood and interpreted.

The testimony of Mr. Kelley, hereinbefore set out at length, shows that the controlling purposes in these acquisitions were not to restrain or monopolize trade, but were to bring about large and essential economies in the production of copper; to save many of these companies from actually operating at a loss; to prevent the necessity of expending unlimited amounts of money in determining the apex rights of the various companies in order to protect the diversified stock interests held therein; and also to save enormous expenditures in maintaining and keeping up separate workings in the several companies; and carrying on separate and independent development work, all of which might well be done together; and the acquisition of the Alice property particularly, as well as many others, was for the

purpose of preventing the life of the company being extinguished and its usefulness ended by the depletion of its ore reserves.

The testimony of Mr. Gillie shows that with all the acquisitions of the Alice properties, the Clark properties and the Heinze properties, the ore reserves of the Anaconda Copper Mining Company combined, were not equal to what the ore reserves were of the several companies whose control was acquired by the Amalgamated Company in the year 1899.

These things were entirely legitimate; these purposes are free from fault. They demonstrate only the exercise of ordinary business prudence. Their essential tendency was, as we have hereinbefore pointed out, not to restrain, but to ultimately expand and develop interstate trade in the copper product. Such being so, whatever incidental restraint of either competition or commerce (the two being distinguishable), arose out of these acquisitions, must be held under the authority of all the cases to be indirect, collateral, incidental, and not inhibited by the Anti-trust Act. Also, whatever restraint, if any, incidentally arose, either to competition or to interstate trade, was not undue, neither was it unreasonable; but it was altogether reasonable under the definitions hereinbefore quoted. Can it be said to have been an unreasonable exercise of inherent right of every company or individual, to contract for its own advancement to acquire these properties, when the acquisition was absolutely essential for the purposes

hereinbefore stated? The acquisition was lawful; it was a reasonable exercise of the contracting power of the corporation in its direct purpose, and no unlawful intent was entertained. Its ultimate result will be, as the court knows, to enable the Butte camp to operate many years longer than it would be enabled to operate under the system of independent companies and organizations, all of which leads unerringly to a result beneficial to the interstate trade in the copper product. Such being true, the acquisition of these properties must be held to be altogether legal, and a legitimate exercise of the corporate power of the Anaconda Copper Mining Company to maintain and continue its own existence, and to carry out the purpose for which it was organized.

In Complainants' brief, the following is quoted from Judge Smith's opinion in the International Harvester Company case, 214 Federal, 987, the same being a case greatly relied upon by the Complainants in their argument:

"Suppression of competition, where the parties to a combination control a large portion of the interstate or foreign commerce in the article, and where there is no obligation to form the combination, arising out of the fact that the parties to the same are losing money or the like, has been held an undue restraint of trade."

If the fact that the parties are "losing money or the like" would entitle those controlling a large portion of the interstate or foreign commerce in an article,

to enter into a combination in relation to the same, then would not the facts hereinbefore set out authorize the acquisition of competing properties in the same neighborhood, when the entire acquisition did not produce more than twenty-five per cent of the total output of the product in the United States? Certainly the impelling reasons for these acquisitions in the case at bar fall within the language of the decision "losing money or the like," and fully justify the acquisition of this property.

Again, in the Complainant's brief, the following, from the same case, is quoted with entire approval:

"If the five companies which formed the International had been small, and their combination had been essential to enable them to compete with large corporations in the same line, then their uniting would, in the light of reason, not have been in the restraint of trade, but in the furtherance of it; but when they constituted the largest manufacturers of their articles in America, if not in the world, and held jointly about eighty to eighty-five per cent of the trade, and two, at least, of the companies forming the combination were prosperous, their combining was, when similarly viewed, an unreasonable restraint of trade."

By the adoption of this language as a correct statement, the complainants have overthrown their own contention.

It clearly appears from the evidence in this case, as hereinbefore pointed out, that the economies brought about by the acquisition of the properties acquired by the Anaconda Company were absolutely essential to

enable these companies to continue to be successful competitors, with a reasonable profit, against the other copper producers of the United States, and that these acquisitions were also absolutely essential in order that the life of the company might be prolonged, and it be enabled to continue to carry out its corporate purposes; and the reasons for these acquisitions pointed out in the testimony are certainly more cogent than the reasons assumed in this excerpt from the Harvester case as being sufficient to render combinations of independent manufacturers and dealers in agricultural implements entirely lawful.

The following excerpt from the same case appears to be greatly relied upon by complainants:

“We think it may be laid down as a general rule that if companies could not make a legal contract as to prices, or as to collateral services, they could not legally unite, and as the companies named did in effect unite, the sole question is as to whether they could have agreed upon prices and what collateral services they could render when their companies were all prosperous and they jointly controlled eighty to eighty-five per cent of the business in that line in the United States.”

It is unnecessary to inquire at length as to the technical accuracy of this statement. Taken in its entirety it is not pertinent to the case at bar.

We shall not attempt to determine when companies may unite on prices, but we assert that it has been determined under exactly what circumstances one company may acquire the property of another; or

two or more companies may unite in the operation of their business by the Standard Oil and Tobacco cases, hereinbefore referred to, and while this statement might have the effect to extend the application of the rules therein set out to the case of an agreement on prices, it cannot have the effect of limiting, modifying or changing the rules therein announced in reference to acquisition of property. We think, however, that the statement is unsound, and for the reason, among others, that it has been thoroughly demonstrated by the authorities that one company may acquire the property of another, or two or more companies may unite, when the main and direct purpose is to prevent the losing of money, to continue the life of the organization and its business, to put in force economies which enable it to compete with others more advantageously situated, although the indirect effect of such acquisition or combination may be to restrain commerce or raise the price of the article sold, whereas, any agreement to raise prices, between companies, must necessarily have for its purpose a direct effect upon trade and commerce, and might therefore bring about the evils condemned by the Act.

While we find nothing in the Harvester case which, in our judgment, controls the case at bar, we may be permitted to say that the quotations made from that case by the counsel do not appear to have been the opinion of the court. Three opinions were prepared and handed down. All the excerpts from the case are

from the opinion of Judge Smith, who wrote the leading opinion in the case. Judge Hook handed down an independent opinion in which he makes no reference whatever, either of approval or disapproval, to the reasoning of Judge Smith, except upon one point, and this one point is in fact the only point of concurrence among the three judges who decided the case, and that point is that the combination of dealers and manufacturers of agricultural implements, controlling from eighty to eighty-five per cent of the entire product of the United States, and located in different states, engaged in interstate commerce, necessarily, on account of its magnitude, resulted in a restraint of trade between the states.

Judge Sanborn, for whom both the lawyers and the judges of the country have long entertained a profound respect, dissented. But it clearly appears from that case that if this case were being considered upon the same principles as was the Harvester case, the result would not be ruled adversely to Appellees thereby, and this may be conclusively developed and demonstrated in a few words. In the Harvester case, the combined companies from the outset, controlled from eighty to eighty-five per cent of the entire production and trade in agricultural implements. It appears from the opinion of Judge Smith that that percentage was afterwards increased, to exactly what extent cannot be ascertained. The decree of the court in reference to the dissolution of this combination is as follows:

"It will therefore be ordered that the entire combination and monopoly be dissolved, that the defendants have ninety days within which to report to the court a plan for the dissolution of the entire unlawful business into at least three substantially equal, separate, distinct and independent corporations, with wholly separate owners and stockholders."

The Court will observe that after the combination was divided into three distinct, separate, equal corporations, each of these corporations would be in absolute control, upon equal terms, with every other corporation, of practically thirty per cent of the entire agricultural implement product of the United States; so re-organized, the court deemed each organization lawful and not in contravention of the Anti-Trust law.

In the case of the Anaconda Copper Mining Company, with all of its acquisitions, it now, and at all times for many years past, has only controlled a fraction over twenty-one per cent of the entire copper production of the United States, and each year it controls proportionately less, and the court also knows, from the testimony, that this production is carried on under conditions greatly adverse to those enjoyed by the great bulk of the copper producers of the United States in its production. Furthermore, the copper production of the Anaconda Copper Mining Company, and all the copper production of the United States, has strong competition from the copper mines of Mexico and other countries of the world, whereas, the market in the United States for agricultural implements is

essentially confined to those produced therein. Thus, the final result of the International Harvester Company case is a direct authority which, if followed, would lead to a denial of the relief insisted on by the complainants.

But it is said that it is not essential that either the Amalgamated Copper Company or the Anaconda Copper Mining Company shall have brought about any of the evils against which the Anti-Trust law is directed, but that if either of them have the power on account of the magnitude of their holdings, to restrain trade or commerce, that they therefore become inimical to the law, and subject to dissolution, which dissolution is now sought in part at least by complainants in this case by taking away from the Anaconda Company the Alice properties. That which does not exist of course cannot be dissolved, and although the Anaconda Company might threaten a monopoly, this, of course, could be effectually restrained without its disintegration. But we assert that nothing appears in the evidence showing that either the Amalgamated or Anaconda Company has the power, on account of the magnitude of its holdings, to create a monopoly, either in whole or in part, of the trade in copper, or that either ever attained that preponderating influence in the copper business which is essential before it can be held to have violated or threatened violation of the law.

All authorities agree that any combination to be violative of the Sherman Anti-Trust law must have ob-

tained control of at least a preponderating part of the commerce in some particular article. The word "preponderating" may not mean the same in every case, but in the absence of some exceptional or extraordinary circumstances, such as the control of transportation facilities, or a monopolization of a raw product out of which the article is produced, or the like, none of which appears in the instant case, then preponderating influence can only be obtained by the engrossment of more than the major part of commerce, between the states, in some particular article.

Neither Amalgamated nor Anaconda can legally be said to have had a preponderating influence in the copper commerce of the United States, when the total amount of their copper production is less than twenty-five per cent of the whole, and when they do not, by any trade contracts or control of transportation facilities, or otherwise, control the sale of copper in any geographical division of the country.

Neither can it be said that, controlling less than twenty-five per cent of the copper of the United States, which percentage is constantly decreasing, even though such control were created with an unlawful intent to monopolize interstate trade, the acquisition of the Alice properties, bearing zinc and silver only, would bring about a dangerous probability that either of said companies would ultimately engross a preponderating part of the commerce in copper, without one of the other of which there can be no violation of the Sherman Anti-Trust law.

In an article in the Columbia Law Review for December, 1910, Volume 10, page 687, Mr. Morawetz states that:

“According to common usage in modern times, the phrase ‘to monopolize commerce’ means by the elimination of competition to secure to some individual or group of individuals control of all or of a largely preponderating part of the commerce in some article.”

In the Standard Oil case, in referring to the section against monopolies, the Supreme Court thus interprets the same:

“The commerce referred to by the words ‘any part’ construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.”

In other words, before there can be a monopoly, one of the classes of things, or one product which is in interstate commerce, must be monopolized in some geographical subdivision of the United States. Now, it is perfectly clear that the Anaconda Copper Mining Company has no power to monopolize copper, which is one of the classes of things mentioned, in any geographical subdivision of the United States. Its whole product is sold and must be sold, in every geographical subdivision of the United States, with the other copper producers of the United States, who produce over three-fourths of the product;

and also with the copper producers of Mexico and other producers of the world, and neither the Anaconda Copper Mining Company nor the Amalgamated Copper Company has the power, on account of the fact that they produce less than twenty-five per cent of the copper of the United States, to exclude from any geographical subdivision of the United States the competitors which now exist, and for years past have existed.

The decisions touching combination of competing lines of railway, of course, have no bearing upon this situation. Products shipped in interstate commerce over lines of railway, must be shipped over those adjacent. There is no escape from this. Therefore, a combination between the Great Northern Railway Company and the Northern Pacific would, at every common point touched or served by those lines, necessarily result in a monopoly in all shipments arising from those compelled to ship from such common points. Moreover, we assert that the authorities do not justify the conclusion that the mere possession of power to do an illegal act, or to form a monopoly, either in whole or in part, renders the corporation possessing such power, amenable to the Anti-trust law. It is true that there are some expressions in some of the cases from which such an implication might be drawn, but in every instance such expressions will be found to be either absolutely *obiter*, or to have been used in the sense that the power possessed by the combination necessarily resulted in a stifling of trade in interstate commerce; that the power, even if possessed, must be either exercised, or

that there must be a dangerous probability of its immediate exercise, before the law will be brought to bear upon such a combination or corporation, is so abundantly settled by the authorities that the question is not open to serious controversy.

In *Moore on Interstate Commerce*, Section 337, it is said:

“The test of an unlawful combination under the Anti-Trust Act is its necessary effect upon free competition in commerce among the states or with foreign nations.”

In *Swift Company v. United States*, 196 U. S., page 396, it was said:

“Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.”

Again, in the same case, page 402, it was said:

“Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law.” (Citing cases.)

On this point it was said in the *Standard Oil* case, on page 60:

“The statute under this view evidenced the intent not to restrain the right to make and enforce

contracts, whether resulting from combination or otherwise, *which did not unduly restrain interstate or foreign commerce*, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.”

In the same case, referring to the decision in the case of *United States v. Freight Association*, and *United States v. Joint Traffic Association*, the court said:

“As the cases cannot by any possible conception be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the *restraint of trade* which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon it having been found that the acts complained of were within the statute and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon when rightly appreciated were therefore this and nothing more. That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly *restraints of trade within the purview of the statute*, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made.”

In the Hopkins case, cited with approval in the Standard Oil Case, page 66, the Supreme Court said:

"There must be some direct and immediate effect upon interstate commerce in order to come within the Act."

In the Addyston Pipe & Steel Company case, 175 U. S., page 244, it was said:

"We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity."

In United States v. Union Pacific, 226 U. S., page 82, the Supreme Court quoted the following with approval from United States v. Joint Traffic Association:

"It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."

Again, in that case, on page 86, it is said:

"If it is true, as contended by the Government, that a stock interest sufficient for the purpose was obtained in the Southern Pacific Company, with a view to securing the control of that company, and

thus destroying or restricting competition with the Union Pacific in interstate trade, the transaction was in our opinion within the terms of the statute."

We have already pointed out the difference in the situation of two combining railroads, serving the same territory, and the combination which is now being discussed. Each independent road is a monopoly to a very large extent in and of itself, and the combination of two roads serving the same territory only enlarges that monopoly. A shipper residing at a common point touched by two railroads only, has no choice except to ship over one or the other. Therefore, if the two be combined, the monopoly of one is extended to the monopoly of the two, and geographically it becomes a complete monopoly, against which, or with which, no other railroad company can possibly compete. It must therefore necessarily restrict interstate commerce.

The distinction is apparent between this situation and the situation of the Anaconda Copper Mining Company selling its product in every geographical subdivision of the United States in direct competition with that of every other producer, both in the United States and elsewhere, and from which territory, or no part of which, any producer or seller could possibly be excluded.

In the Northern Securities Case, 193 U. S., page 331, the court said:

“The Act declares illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be the parties to it, *which directly or necessarily operates in restraint of trade or commerce* among the several states.”

Moreover, there is a distinct difference between public corporations, such as railroads, and private ones, such as mining companies, which is clearly pointed out in

United States v. Freight Association, 166 U. S., 334.

The case of International Harvester Company v. Missouri, 234 U. S., cited by complainants, has no application. In that case the Supreme Court was construing a statute of the State of Missouri, the most casual reading of which will demonstrate to have been much broader in its terms and more drastic in its provisions than the Sherman Anti-Trust law. It has already been construed by the Supreme Court of the State of Missouri, and of course such construction was in the main controlling upon the Supreme Court of the United States. The statute of the State of Missouri was directed against, not only restraint of trade and commerce, “but also against all acts which would tend to lessen full and free competition.” No such language as this is found in the federal statute, and it has been expressly ruled not to be so comprehensive.

United States v. E. I. Du Pont, 188 Federal, page 127.

The O'Halloran case, 207 Federal, 188, is quoted from in complainants' brief as tending to show that power only is essential to render a corporation or combination unlawful. An examination of the case shows that the remarks in preference to power only were not at all essential to its decision, and the statement being *obiter*, the learned Judge did not use that precision or accuracy of expression which might reasonably have been expected, had the question been essential. Other portions of the paragraph quoted show beyond question that it was not used in the sense now attributed to it by counsel. Other declarations of the court show that the rule as contended for by us met its full concurrence. On page 189 it was said:

"So far as the intent of the defendants is involved, they are presumed to have intended the necessary, natural and known effects or consequences of their agreements and acts, and if these *effects or consequences be to unduly restrain interstate trade and commerce, then the combination is illegal and the participants are chargeable with the consequences.*"

Again, on page 191, the court said:

"But when those theretofore engaged independently in producing and selling an article combine their money, intelligence and effort for the *purpose of limiting the supply and controlling the supply and controlling the prices of such article, and destroying competition, and they interfere with interstate commerce, or their combination is such as in its operation and execution will bring about these results*, they have become violators of the statute referred to, regardless of intent."

Certainly mere power would not subject the Anaconda Copper Mining Company to the forfeiture of its property at the suit of a stockholder of the seller; neither would it, upon the suit of the United States. Power, coupled with a wrongful attempt, realizing a dangerous probability, might subject the corporation, at the suit of the government, to the preventive remedy of injunction, but not to a dissolution or to disintegration. It is only when monopoly actually exists and no other remedy is apparent, that the unlawful combination will be dismembered. Upon this point in the Standard Oil Case, on page 77, it was said:

“It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*, 196, U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, *but also a monopolization*, the *duty to enforce the statute requires the application of broader and more controlling remedies.*”

Some pages of Appellants' brief are devoted to a discussion of the testimony of one Lawson, which it is claimed discloses that it was the intent of the original promoters of the Amalgamated Copper Company to form an unlawful combination to monopolize the copper industry of the world. In view of the admission contained in Appellants' brief, and the statement of the grounds upon which they rely, we are unable to understand why they should have called attention to this

testimony at all, unless it be that it is thought to be entertaining. In the brief of Appellants' it is said:

"The intent with which the combination assailed in this case was formed is clear from its history without this direct evidence of the ends sought to be accomplished by its projectors, *but the intent in this case is of very little consequence*, the necessary effect of the combination being to place in the Amalgamated the power to restrain trade, the proof of intent to accomplish such restraint is unnecessary. It is only where it does not appear that the 'inherent nature and effect' of the combination is to restrain trade that the proof of intent becomes material." (See page 132.)

In view of this admission by Appellants it would seem unnecessary to take notice of the testimony of Lawson, as it is clearly herein stated that this testimony has no influence upon the determination of the question of the legality or illegality of the acquisition of the Alice properties by the Anaconda Company. Testimony to establish wrong-doing of this character must be clear, convincing and conclusive, and the testimony upon the point of this intention fails to satisfactorily establish it. A reading of the Lawson testimony impresses one with its improbability. Such a scheme as outlined by him would hardly have been entertained by men with business acumen like unto that possessed by Mr. Rogers and Mr. Burrage, his associate. In short, it appeared to be a project to corner all the money in the world and then with that money to buy the big round world itself. The manner of the examination of Mr. Lawson condemns his evidence. A voluntary and will-

ing witness for the complainants, he was persistently led in the examination by references and quotations from public statements made by him for hire through Everybody's Magazine, when he was engaged in the business of "muck raking" during "the muck raking" era, which happily now appears to have largely passed away. Having been placed in such a situation by the counsel of the parties for whom he appeared, it was the most natural thing in the world that even at the expense of his conscience, he would assert that that which he had so solemnly stated in the public prints was not open to question. Indeed, the situation in which he was trapped would, in the absence of time for deliberation, naturally lead to this result. Aside from the inherent improbability of his statements, he is substantially contradicted by Mr. Burrage's testimony, and by all the circumstances surrounding the organization of the Amalgamated. His statements are rendered further improbable by the utter impossibility of ever so powerful financial interests as those represented by Mr. Rogers carrying out the details of the disclosed plan, and fifteen years of unimpeachable conduct upon the part of the Amalgamated Copper Company and the Anaconda Copper Mining Company, furnish irrefragable proof that his statements in regard to the unlawful intent of the promoters of the Amalgamated are not substantially correct; but even admitting their truth, we are unable to conceive upon what legal principle such an unlawful intent can furnish ground for the rescission of the purchase of the Alice properties. There is positively

no evidence that such intent was ever put into effect by an attempt to monopolize, and even if it could be said that such an attempt was made, it must be said that it has proven to be entirely ineffectual; and an ineffectual attempt at combination, with an intent to monopolize, would fall far short upon well known legal principles of furnishing ground for the rescission of the purchase being considered. Neither Amalgamated nor Anaconda ever obtained a preponderating influence in the commerce in copper; neither ever had the power or reached so near attaining such power as to render it dangerously probable that interstate commerce in copper would be monopolized, and each year since the organization of the Amalgamated Company has brought both the Amalgamated and the Anaconda farther and farther away from such a preponderating control of the commerce in copper as would render either corporation objectionable. But there is a further consideration. It will be remembered that the Anaconda Company was a corporation long prior to the organization of the Amalgamated. It owned property, had property rights and thousands of stockholders. Since the organization of the Amalgamated it has acquired a majority of the stock of the Anaconda Company, and we are not advised upon what principle an unlawful intent, entertained by the promoters of the Amalgamated Company at the time of its organization, and by men, some of whom were never connected with it in any way or had any legal capacity to act for it after it became a corporation can, ten or twelve years thereafter be imputed to the Anaconda

Company, so as to take away from it property which it has purchased, and thus vicariously punish the thousands of innocent stockholders and other persons holding the securities of that company. It is neither law nor logic to punish vicariously or to visit the sins of the parents upon the children even unto the third and fourth generations.

United States v. E. I. Du Pont Company, 188 Federal, 127. This case, as presented by complainants, has, in our judgment, never been ruled upon the facts in any other case. To sustain the contention of Complainants would make the Sherman Anti-Trust Law so comprehensive in its operation as to render it ridiculous in the extreme. In all other cases which have been the subject of serious consideration by the courts, arising out of the Sherman Anti-Trust Law, there have been controlling facts which do not appear herein. In some there have been actual monopolization by unity of control of competing railroads. In some there has been actual monopolization arising as a necessary consequence of the combination having secured control of more than a majority of the trade in designated articles, and in almost every instance from seventy-five to one hundred per cent thereof. In some there have been actual contracts, dividing territory and restricting commerce. In others, together with these elements, or some of these elements, there have been violations of law, unjust treatment of competitors, espionage, and other evidence, showing conclusively an illegal purpose and

an unlawful intent. In no case has a combination been declared illegal and unlawful simply on account of the magnitude of its investments, without other facts giving to its transactions a criminal color.

In the Standard Oil Case, although the Standard Oil Company and its subsidiaries transported more than four-fifths of the petroleum derived from the Pennsylvania and Indiana oil fields, manufactured more than three-fourths of all the crude oil refined in the United States, owned and operated more than one-half of all the tank cars used to distribute its products, marketed more than four-fifths of all the illuminating oil sold in the United States, exported more than four-fifths of all the illuminating oil sent forth from the United States, sold more than four-fifths of all the naphtha sold in the United States, and sold more than nine-tenths of all the lubricating oil sold to railroad companies in the United States, the Supreme Court did not base its decision adverse to that Company upon these facts, but upon its destruction of the potentiality of competition, and upon its methods of business adopted for the purpose of excluding others from the trade, and upon its acts and dealings done with the intent to drive others from the field and to exclude them from their right to trade.

Likewise, in the American Tobacco Company case. That Company produced from 70 to 96 per cent of the various kinds of tobacco products in the United States, but the decision was based upon the business methods used by it to drive competitors out of business.

Likewise, an examination of all other cases decided by the Supreme Court of the United States will disclose that no decision has ever been based alone upon the magnitude of the investments of the offending corporations, but other elements have been made the basis therefor; and never has it heretofore been asserted that control by one Company of less than one-fourth of an article of commerce in the United States would subject the offending corporation to any of the penalties of the Sherman Anti-Trust Law. We therefore say it is not ruled upon the facts by any precedent so much as it is ruled by reason, and when viewed in the light of reason, as it must be, the contentions of the complainants "vanish into thin air'."

It will be hardly conceived upon what principle the purchase of a silver and zinc property by the Anaconda Company, a company controlling less than twenty-five per cent of the commerce in copper within the United States, would tend to defeat competition in the copper markets of the world, and therefore could be set aside and rescinded by a dissenting stockholder of the seller. The simple statement of the proposition bears upon its face its own refutation.

From the foregoing, we confidently assert that the decree of the court below should have gone unconditionally in favor of the Appellees; that there should have been no interlocutory decree; that the errors of the court touching its findings of fact, as well as its conclusions of law, detrimental to the rights of the Appellees in this

case, should be now corrected; and without further consideration as to the regularity of the proceedings had before the entry of the interlocutory decree, or their due authorization by the principles of equity, the final decree of the court below should be affirmed.

IV.

ALTHOUGH THE FINDINGS OF FACT MADE BY THE COURT BE NOT DISTURBED, AND BE HELD BY THIS COURT TO BE JUSTIFIED BY THE TESTIMONY IN THE CASE, THE DECREE OF THE COURT IS NEVERTHELESS CORRECT AND SHOULD, IN ALL RESPECTS BE AFFIRMED.

The decree of the court, directing the sale of the Alice property at public vendue, is vigorously assailed by complainants, but most of their argument touching upon the same is altogether beside the question and rests upon no sound basis either in law or reason.

The court framed its interlocutory decree largely upon the theory of the case of *Pewabic Mining Company*, 133 U. S., 50. In this connection the learned court below said:

“The instant case in principal resembles *Mason against Pewabic Mining Company*, 133 U. S. 50. The difference between them is also of degree only. For a proposed sale of all property of a corporation in process of dissolution by the majority to a new corporation by them organized and for its stock to be distributed to the former’s stockholders, is substantially like an executed-like sale for like consid-

eration and purposes by a majority of a corporation contemplating dissolution to another corporation in which they are interested, so far as the rights of minority stockholders are concerned.

"The rule of the *Pewabic* case is that any stockholder can insist that any sale of all corporate property upon dissolution shall be to the highest bidder for cash, and not to a corporation in which the majority are interested and for its stock at prices fixed by them.

"In the matter of relief to be granted, it appears plaintiffs own 12,560 shares of Alice of 400,000 shares outstanding. At the time of sale Butte-*Coalition* owned about 234,000 said shares. The sale was ratified by 289,590 shares, and opposed by 5,500. * * * In any event, at least 34,000 shares of Alice are owned by others than the parties hereto and Amalgamated. A court of equity will model relief so that all parties in interest, whether before the court or not, will be protected. As before stated, the majority could lawfully sell Alice. The minority's right was a fair sale for money to the end that each thereof received in money the value of his equity in Alice property. Their present right is to sufficient relief to still accomplish that end.

"The sale is not to be unconditionally set aside, however, for unless the property can be sold for more the interest of all the parties hereto and of those stockholders who neither appeared nor complained, require it shall not be disturbed. The method of the *Pewabic* case will be followed as near as may be. The value of the *Anaconda* stock paid for Alice was \$1,500,000. Some \$300,000 dividends thereon have since been paid. What was the amount of debts and obligations of Alice assumed by *Anaconda* does not appear. The decree will provide that a re-sale will be made and provided when made if no bid greater than the total proceeds to Alice as above be made, and provided thereupon defendants pay to plaintiffs and all those entitled thereto the

money value of their equity in the proceeds of the sale heretofore made; that is, their proportionate share of the market value of the Anaconda stock at the time of the sale and of the dividends thereon, no re-sale will be made and the sale involved will be undisturbed. Thereby defendants will gain no advantage, plaintiffs will suffer no loss, and all Alice stockholders will receive their just dues."

(Tp., Vol. I, pages 187-188-189).

A moment's attention to the rights of all parties before the court in this case will demonstrate the correctness of the theory upon which the court proceeded, and the absolute soundness of the decree entered by it.

The Court found, as a matter of both law and fact, that Alice stockholders had a right to sell Alice property. It further found, and it is undisputed, that at a meeting of said stockholders, property noticed and held, it was voted to sell Alice property, and not only was it voted to sell Alice property, but a purchaser was found therefor and the terms of sale agreed upon. It is also found by the Court that the sale of the Alice property was authorized in pursuance of a plan touching the ultimate dissolution of the Alice Company. In this connection it should be borne in mind that not only had the Alice stockholders authorized the sale of Alice properties, but Alice stockholders had gone further, under authority granted them by the laws of the State of Utah, and at a meeting regularly called and held, the requisite number of the stockholders of the Alice Company had passed a resolution authorizing and requiring

the dissolution of the Alice corporation, the winding up of its affairs and the distribution of its assets.

No question is made as to the legal right of the stockholders of the Alice Company to do the latter, and no question is raised in reference to the regularity of the proceedings by which they sought to accomplish this result. Proper proceedings for dissolution, under the laws of the State of Utah, were, according to the allegation of complainants' bill, and according to the testimony in this case, pending at the time they were thwarted by the suit of complainants.

Dissolution of the Alice Company necessarily involved and carried with it the sale of all of Alice property and the distribution of the proceeds thereof to the stockholders. The right to so dissolve the Alice Company and the right to take all necessary steps under the law to effect such dissolution, including a sale of the Alice property, whether it be stock of the Anaconda Company or be the physical properties of the company, and to distribute the proceeds amongst the stockholders of that Company, has not been questioned, neither can the same be.

The only vice the Court found in the former sale to Anaconda was that there was doubt as to whether an adequate consideration had been obtained for the physical properties of the Alice, and that under the circumstances there should have been, if possible, a sale for cash. It was further held that upon final dissolution stockholders were entitled to receive their pro rata

share of the assets in cash instead of being compelled to take their share of the property of the Company in kind.

It is true that the complainants, representing an almost negligible percentage of the stock of the Alice Company, opposed, as stated by Appellants in their brief, the sale of this property upon any conditions whatsoever; but while they might have a right to oppose the sale of it in the manner and under the circumstances attending the first sale to the Anaconda Company, they never have at any time had any standing in court to prevent the Alice Company, through proper corporate and stockholders' action, dissolving said Company, which dissolution necessarily carried with it the sale of all its properties and the distribution of its assets, or to question the authority of the stockholders to provide, by resolution, for sale of the property, or to question the right of the majority to sell to Anaconda, provided there was no other purchaser who would pay a larger price.

The right of the majority of the stockholders of the Alice Company to sell the property of the Alice Company, and to dissolve the same, and the regularity of the proceedings which had been already taken to attain these ends, and the right to sell to Anaconda under proper circumstances, it was the duty of the court to maintain and respect in its decree, notwithstanding the objection of those dissenting, because this right was given to the majority stockholders by the laws of the State of

Utah, and before the institution of the suit effectual steps had been taken to attain these results.

The right to sell, also, as well as to dissolve, on account of the failing condition of the corporation, which was vindicated by the decision of the learned court below, was also an inviolable right which it was the duty of the court to protect in its decree.

Alice minority stockholders, objecting to the sale to the Anaconda Company, submitted their rights, as well as the rights of the majority stockholders, to a determination of a court of equity, invoking its judgment therein, and the court would have been derelict in its duty if it had not so framed its decree that it would be effectual to protect the rights of both.

In 16 Cyc., page 478, it is said:

“Equitable relief may be adapted to the circumstances of the case. There is no limit to the variety of decrees in this regard. While certain equitable remedies are called for with sufficient frequency to create definite rules for framing the decrees in such cases, in order to accord the appropriate relief, these categorical remedies do not limit the scope of decrees. While equity will not do that which is only a hardship to defendant and of no benefit to plaintiff, still where plaintiff clearly establishes his right, the court must award the appropriate relief without considering inconvenience to defendant. It is of course impossible to specify what relief may be awarded outside of the well-defined and common equitable remedies; but it may be said in general that the court will adjust the relief in such a way as to afford fair protection to the rights of all parties.”

As already observed, when the Court came to enter its interlocutory decree it was its duty to protect not only the rights of the minority but also those of the majority. For the Court to have unconditionally set aside this sale would have denied to the majority of the stockholders of the Alice Company their undoubted right to dissolve the Alice Company and to dispose of its property and distribute its assets. It would have also denied to them their undoubted right, on account of the failing condition of the corporation, to sell and dispose of the entire property of the corporation as a step in the dissolution of the Company. It would have required the Alice Company to undo what it had already legally done in pursuance of these lawful purposes. It would have left undetermined and uninforced the rights of either. Before the majority could have made further progress in the accomplishment of these legitimate purposes, they would have to do over again the things already done, and once more submit to the court the question as to in what manner the indubitable right of the majority of the stockholders of the Alice Company to dissolve the Company and dispose of its property might be carried out. A result wholly inconsonant with the rules of equity or the jurisdiction of its courts.

The minority stockholders therefore had no right to prevent the dissolution of the Alice Company, nor to prevent a majority of its stockholders from selling its property and distributing its assets among its stockholders, nor to prevent their selling to Anaconda provided

a better price could not be obtained from others, but only had the right, according to the opinion of the court, to have the property offered for sale, sold free from any unfair bargaining on account of unity of control between the Alice and Anaconda Companies, and to have the assets of said Company converted into cash and their portion distributed to them in cash.

Complainants seriously object to the Court having directed the sale of this property at public vendue, but undoubtedly this was the only method known to a court of equity by which, when it becomes its duty to convert property into cash, this duty can be discharged. This clearly appears from the numerous citations of authorities found in the *Pewabic* case. And if the Court had not directed the sale at public vendue, what method could the Court have possibly pursued. The Court could not direct the complainants in this case to undertake a private sale of the property. This would have deprived the corporation and the majority stockholders of its and their rights in the premises; besides it would have availed nothing. Since the year 1910, up to the final decision of this suit, the minority stockholders of the Alice Company had full opportunity to produce a purchaser for this property who would give more than had been given for it by the Anaconda Company. This they failed to do.

The Court could not have directed the Alice Company, through its officers and a majority of its stockholders, to secure a purchaser for this property other

than the Anaconda Company. Courts do not commit the execution of their judgments and the carrying out of their decrees to the tender mercies of either of the parties to a litigation of this character; but they commit the sale of property, when such must be made under decree of the court, to an impartial officer appointed to carry out such purpose, and direct a public sale, upon due notice, as the method best calculated to obtain the best price.

Complainants make an ineffectual effort to distinguish the Pewabic case from the instant case, but unquestionably the principles of law controlling the two cases are identical. The Pewabic Mining Company was organized on the 4th day of April, 1853. By the laws of the State of Michigan the life of the corporation was thirty years, thereby its charter expired on the 4th day of April, 1883; but although its charter expired upon said date, it was provided by the laws of the State of Michigan "that all corporations whose charters shall expire by their limitation * * * shall nevertheless continue to be bodies corporate for the term of three years after the time they would have been so dissolved, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, dispose of and convey their property, and divide their capital stock, but not for the purpose of continuing the business for which such corporations have been or may be established." The corporation continued its business until the 26th day of

March, 1884, but this is not material here. On the 26th day of March, 1884, within the period of time granted by the statutes of the State of Michigan within which said corporation could wind up its business, a resolution was passed by more than two-thirds of the stockholders of said Company, providing for the sale of its physical properties to another corporation for the sum of Fifty Thousand Dollars and the taking of stock in payment thereof, such stock to be distributed among the stockholders of the Pewabic Company; such of its stockholders as might refuse to take the stock of the new corporation, to receive their pro rata share of the consideration in money.

When it is remembered that in the case of the Alice Company a majority of the stockholders had sold its physical properties, under authority granted them by the common law, to the Anaconda Company for the stock of that corporation; and when it is remembered that exercising their indubitable right, under the laws of the State of Utah, proper proceedings had been taken by more than two-thirds of the stockholders of the Alice Company to dissolve the same, wind up the affairs and distribute its assets, the analogy between the two cases becomes instantly apparent, and that they are ruled by identical principles cannot be controverted. Both Pewabic and Alice were legally undergoing a process of dissolution.

The distinction attempted to be drawn by Counsel, that because in the Pewabic case a minority of the stock-

holders were insisting upon a sale at public vendue, and in this case a minority of the stockholders were insisting that no sale whatever shall be made of the Alice properties, is altogether unfounded, for the reason, among others, that the court below correctly found that the majority of the stockholders of the Alice Company had the right to sell, and had sold, the physical properties of that Company; and for the reason that it clearly appears, as hereinbefore stated, that more than two-thirds of the stockholders of the Alice Company had voted to dissolve that Company, such dissolution carrying with it the sale of the properties of the Company and the distribution of its assets, and their legal right to so dissolve the Company is admitted.

An unfounded contention therefore of the minority stockholders does not in the least alter the principles governing this case, as those principles are laid down in the Pewabic case; and while the minority stockholders in the Pewabic case were insisting on a sale at public vendue, the majority stockholders of the Pewabic Company were insisting that no such sale should be made; and it is inconceivable to us that any Court may be constrained to hold that minority stockholders of a corporation have greater rights than the majority thereof.

We are utterly unable to see the pertinency of the objections urged in Appellants' brief to the decree of the court ordering a sale of this property at public vendue. In the first place, if the court were to offer the property for sale, we might inquire of counsel in what

other manner should it have sold this property. Having the right to offer the property for sale, in order to protect the rights of all the stockholders, and particularly the rights of the majority to dissolve the Alice and to dispose of all its physical properties, the Court was bound to offer the property in a manner consonant with like proceedings in courts of equity. That there is no other known method by which the property could have been legally disposed of is, as heretofore stated, clearly apparent from the many authorities cited in the *Pewabic* case; and complainants having submitted their rights to the court cannot interpose any objection to the method of sale, so long as such method is consonant with the proceedings of courts of equity. And the fact, if such be a fact, that at such a sale the property might not bring as much as it might under some other method, furnishes no reason for complaint upon the part of the complainants. .

It is further stated that complainants were unable to bid themselves for this property; that they had not the means to enter the competition. This statement, of course, finds no basis of fact in the record. Whatever evidence there is touching this point shows that the Walkers, and the interests controlled by them, were wealthy and powerful interests, amply able to bid upon this property if they had considered it a desirable purchase. In addition thereto, from 1910 until the date of the sale, the complainants had every opportunity to procure a purchaser for this property and have him

standing ready to buy the same when it should be offered for sale, if such a purchaser could be found. But all this is of no consequence. The stockholders of the Alice having the right to sell this property, and the right to dissolve the Alice Company, were not compelled by any known rule of either law or equity to refrain from doing so, neither was the court compelled to refrain from doing so, until the complainants should become financially able to purchase the same or sufficiently active and influential in the financial world to secure some one who would purchase it.

It is also said that no one could be found at this time who would bid more than a million and a half dollars for this property; that the Anaconda Company was in a more advantageous position to develop this property and make it profitable than any other company; that it could afford to pay more than any other person.

When seeking to set aside the sale to Anaconda, according to complainants, the consideration is totally inadequate; when seeking to prevent a sale at all, under the order of the court, the consideration is sufficiently large to prevent any competitors from bidding upon the property. These different viewpoints of counsel, taken to meet the exigencies of each situation, are certainly quite antagonistic to each other.

But upon what known rule of either law or equity can it be contended that the conceded right of the Alice Company and its stockholders to dissolve the corpora-

tion, to sell and dispose of its physical properties, and to sell to Anaconda under certain circumstances, and the duty of the court to protect these rights in its decree, shall be made subservient to the matters contained in these suggestions. Likewise, the Alice Company could not be compelled to hold its physical properties indefinitely because a timid investor might apprehend an appeal to the Supreme Court of the United States upon the suit then pending, or because the Anaconda Company desired control of this property and was big enough financially to secure the same, or because other purchasers might consider themselves unwelcome in the Butte Camp, or because of any of the reasons assigned in Appellants' brief.

The right to sell and to sell to Anaconda, and the right to dissolve the Company and the right to distribute its assets were rights granted by the State of Utah, and vindicated in the opinion of the learned district court below, and these rights could not be made to abide a change in conditions which assured to the minority stockholders that a greater sum than that paid by the Anaconda Copper Mining Company could be secured for the physical properties of the Alice Company. If such were the case, any minority stockholder of the Alice Company could forever prevent the Alice Company from being dissolved or from disposing of its property, for not even the complaining stockholders can look forward with any assurance to a definite time when they would be able to bid for this property or willing to do so, or successful

in obtaining a purchaser therefor willing to bid more than that which was bid by the Anaconda Company, or when the situation of the Anaconda Company in relation to the Alice property would not be relatively the same as it was at the date of the purchase, or when the Anaconda Company would not have a perfect right to raise the bid of any bidder therefor, or when some dissenting stockholder might not institute litigation touching the sale of the property which might terminate in an appeal to the Supreme Court, or when it might not be unjustly charged, without any basis in the testimony, that any new-comer in the Butte Camp would be regarded as an interloper.

We respectfully submit that the decree was in all respects correct; that it protected every right which the law gave to the complainants. It gave them every opportunity to either purchase or secure a purchaser, at an advanced price, for the Alice properties. It provides a means by which they were entitled to have the assets of the Alice Company distributed to them in cash instead of in stock of another Company; and it also protected the rights of the majority of the Alice stockholders to sell all the property of the Alice Company, and to dissolve the corporation and to wind up its affairs. All the minority stockholders could possibly ask for was a full and fair opportunity to find a purchaser for Alice properties who would pay more than Anaconda. This full and fair opportunity was given to them. They absolutely failed. No purchaser could be found. For the

Court, under these circumstances, to have unconditionally set aside the sale of the property to Anaconda, and to have forbidden the majority of the Alice stockholders to sell the property to Anaconda, would have been to indefinitely suspend the authority which the majority of Alice had to dispose of the property, and would have been a gross wrong to the Alice Company and the majority stockholders thereof, and would have been saying in effect that the rights of the Alice Company and the majority of its stockholders should be held forever subservient to the claimed rights of the minority to control and regulate its affairs.

The decree is expressly authorized, not only by the general principles of equity, but by the decision in the Pewabic case, and ought, in all respects, to be affirmed.

Respectfully submitted,

L. O. EVANS,

W. B. RODGERS,

D. GAY STIVERS,

Residing at Butte, Montana,

Solicitors for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit

PETER GEDDES, JOSEPH R. WALKER,
JOSEPH S. BAER, HENRY S. EVERETT,
MARGARET ANN MEEHAN, EUGENE
BLUM, ISAAC BLUM, EDWARD BLUM,
ISADOR BAER, ALPHONS DREYFOOS; AND
ALPHONS DREYFOOS, EUGENE BLUM,
DAVID C. GOLDENBERG, AND EUGENE
BASCHO, COPARTNERS, DOING BUSINESS UNDER
THE FIRM NAME AND STYLE OF DREYFOOS,
BLUM & COMPANY; LEOPOLD FREUND
AND ALICE FREY, APPELLANTS,

vs.

ANACONDA COPPER MINING COMPANY, A
CORPORATION; ALICE GOLD AND SILVER
MINING COMPANY, A CORPORATION, AND JOHN
D. RYAN, J. W. ALLEN, W. D. THORNTON,
A. C. CARSON, AND E. S. FERRY, APPELLEES.

BRIEF OF APPELLANTS.

WALSH & NOLAN,
Solicitors for Appellants.

T. J. WALSH,

Counsel for Appellants.

Filed

JAN 25 1917



United States
Circuit Court of Appeals
For the Ninth Circuit

PETER GEDDES, JOSEPH R. WALKER,
JOSEPH S. BAER, HENRY S. EVERETT,
MARGARET ANN MEEHAN, EUGENE
BLUM, ISAAC BLUM, EDWARD BLUM,
ISADOR BAER, ALPHONS DREYFOOS; AND
ALPHONS DREYFOOS, EUGENE BLUM,
DAVID C. GOLDENBERG, AND EUGENE
BASCHO, COPARTNERS DOING BUSINESS UNDER
THE FIRM NAME AND STYLE OF DREYFOOS,
BLUM & COMPANY; LEOPOLD FREUND
AND ALICE FREY, APPELLANTS,

vs.

ANACONDA COPPER MINING COMPANY, A
CORPORATION; ALICE GOLD AND SILVER
MINING COMPANY, A CORPORATION, AND JOHN
D. RYAN, J. W. ALLEN, W. D. THORNTON,
A. C. CARSON, AND E. S. FERRY, APPELLEES.

BRIEF OF APPELLANTS.

I. Statement of the Case.

This suit was brought by certain stockholders of the appellant Alice Gold and Silver Mining Company to procure a decree annulling a deed of all of

its property to the appellee Anaconda Copper Mining Company made in consideration of the transfer by the latter of 30,000 shares of its capital stock to the first-named company. The appellants, being the dissenting stockholders, insist that the sale which the deed witnesses should be held void:

(1.) Because neither the board of directors nor a majority of the stockholders of the Alice Company were authorized to sell or dispose of all of its property against the protest of any of its stockholders.

(2.) Because the Alice Gold and Silver Mining Company has no authority to acquire the stock of another corporation, and particularly there is no power or authority in any one, against the protest of any of the stockholders, to transform it from a mining corporation, such as the law and its incorporators made it, to a stockholding corporation.

(3.) Because there is substantial identity between the parties who negotiated and carried out the sale and the parties who negotiated and carried out the purchase; in other words, that the business of the Anaconda Copper Mining Company and the Alice Gold and Silver Mining Company were both controlled by John D. Ryan, who is a director of both companies and the president of the Alice Company, and the consideration is inadequate.

(4.) Because the purchase was made in the pursuit of the purpose with which the Amalgamated Copper Company was organized, namely, to monopolize the production of copper in the Butte camp and the sale

of the same in the markets of the world, in violation of the Sherman Anti-trust Act.

The Alice Gold and Silver Mining Company was organized under the laws of the Territory of Utah in the year 1880, its articles defining the powers it was to enjoy as follows:

“The business and pursuit of the corporation shall be to buy, sell, lease, hold, own and operate mines, mining claims, mills, mill sites, furnaces and reduction and refining works; to buy, sell and exchange mineral ores and bullion; to buy, lease, construct and operate roads, tramways, and freight and transportation routes, to facilitate the business of the company; to appropriate, buy and sell water, water rights and ways for conducting the same, and generally to do all kinds of business incident to, connected with, or convenient for the management of a general mining business, in the Territories of Utah, Montana, Idaho, and in any State or Territory of the United States.”

Record, page 3.

The merits of the controversy became the subject of inquiry in this suit first before Judge William H. Hunt, upon an application for an injunction to restrain the Alice from disposing of the stock delivered to it by the Anaconda, that it might be available should a decree be made requiring its restoration as a condition of vacating the transfer. Oral testimony was produced, much of which, being reduced, was read by stipulation at the final hearing. The learned judge filed an opinion reviewing the transaction and holding that the relations between the apparent buyer and the apparent seller were so intimate as to

cast upon the former the burden of proving good faith, fair dealing, and an adequate price.

Record, pages 166-177.

The injunction was granted.

The final hearing occurred before Judge George M. Bourquin, who likewise considered that owing to the identity of control in both corporations the Anaconda was required to make out a case requiring that the sale be affirmed and that it had not done so; in other words, that the presumption of fraud arising from the circumstances of the transaction and the relations of the parties to it had not been overcome. In his opinion, he said:

“The court finds that the price paid for the Alice property was substantially inadequate, and because thereof, of the methods of sale, of the nature of the consideration and its intended disposition, and of the dissent of Alice minority stockholders (plaintiffs), the court concludes that plaintiffs are entitled to relief.”

Record, page 180.

The court did not, however, grant the relief asked, an annulment of the sale, but directed instead that the property should be put up at public auction; that if at such sale it did not bring more than the value of the stock given by the Anaconda for it, found to be \$1,500,000, the sale should stand and that dissenting stockholders should have their proportionate share of that amount of money if they elected to take it for their stock in the Alice; if more should be offered for the property the sale attacked should be

set aside and the property awarded to the successful bidder.

Record, pages 178-189.

There were no bidders at the auction sale and the transfer to the Anaconda was by the final decree affirmed.

Record, pages 152-153.

From that decree this appeal is prosecuted by the complainants.

Record, page 225.

To avoid any question as to the right of the court to review the proceedings resulting in the decree directing that the property be offered for sale at public auction, conceived by appellants to be interlocutory in character, an appeal was taken from it as well.

Record, page 210.

It will be noticed from a perusal of the opinions filed that neither judge felt it necessary in detail to go farther than the third ground upon which the sale is challenged. Neither pursued at any length the inquiry suggested by either the first, second or fourth ground of challenge, though Judge Bourquin intimated that in his view the last is not open to a private litigant.

To understand the material conditions under which the sale to be investigated was made, it will be necessary to attend to the outlines of the history of the Amalgamated Copper Company which, for a time,

occupied a large place in the industrial life of Butte.

Prior to the year 1899 a number of independent companies were engaged in competition with each other in mining and smelting copper ore in the Butte camp and in the sale of the copper product in interstate commerce. Among these were the Anaconda Copper Mining Company, then and still the greatest producer of copper in the world, the Washoe Copper Company, the Parrot Silver and Copper Mining Company, the Colorado Mining and Smelting Company, the Boston and Montana Consolidated Copper and Silver Mining Company, and the Butte and Boston Consolidated Mining Company.

The Amalgamated, on coming into existence in the year mentioned, acquired a majority of the stock of the Anaconda and of the Parrot and all of the stock of the Washoe and the Colorado. It soon secured 96,000 shares more of Anaconda and 10,000 of Boston and Montana, the second largest producer in the world, and by 1901 it had acquired all, or at least a majority, of the stock of that great company, and of the Butte & Boston, increasing its capital stock to make these latter purchases from \$75,000,000 to \$155,000,000, when it was master of practically all producing companies in the Butte field except those dominated by F. Augustus Heinze and those owned by W. A. Clark.

Record, page 541.

At the time the Amalgamated was launched there was in progress between Heinze and his companies on the one side, and the Boston & Montana and the Butte & Boston on the other, bitter and protracted

litigation, which, as soon as the last-named companies became allied with the Amalgamated, involved it and all its constituent companies. The war was waged for a number of years, vexing the social and political life of the State as well as keeping the courts busy. Numberless lawsuits were instituted and prosecuted, many of them reaching this court and the Supreme Court of Montana and some the Supreme Court of the United States. Finally a settlement was effected, in the year 1905 or 1906, the negotiations being carried on between Heinze, for himself and his companies, and John D. Ryan, the president of the Anaconda and a director of the Amalgamated. As a result of this settlement Heinze was paid \$10,500,000 and all or practically all of the properties with which he was associated in Butte were transferred to a corporation organized to take them over known as the Red Metal Mining Company. All of its stock, of the par value of \$11,000,000, was immediately acquired by another company organized to hold it, with a capital stock of \$15,000,000, called the Butte Coalition Company. Of the stock of this company the Amalgamated became the owner of 50,000 of the 1,000,000 shares. Its officers and leading spirits took stock in the new organization. While the negotiations looking to the settlement of the Heinze-Amalgamated litigation were in progress, John D. Ryan, then a director of both the Amalgamated and the Anaconda and the president of the latter, procured an option on more than a majority of the stock of the Alice Company. It owned, at that time, and had owned for many years, about 150 acres of mining ground in the Butte

camp adjacent to properties belonging to companies subsidiary to or being constituents of the Amalgamated. Before the days when Butte became known as a distinctively copper camp, the Alice ground had been extensively worked for silver, but after the slump in that metal in the early nineties operations were carried on in a desultory manner and on a small scale in the upper levels, the lower workings being flooded. The returns were not sufficient to meet the expenses incurred on account of taxes and for the care of the property. The deficiency was met by the holders of the block of stock optioned to Ryan, the Walker Bros. of Salt Lake, Utah,

Record, page 434,

the total obligations of the company when Ryan became interested in it amounting to about \$27,000. On the organization of the Butte Coalition he transferred to it his option on the Alice stock and that company took it over, acquiring 234,215 shares at \$1.50 per share. Ryan thereupon became a director of the Alice, and at the time of the transfer here involved was its president.

Record, pages 391-400, 618.

In the year 1909 those in control of the Amalgamated conceived it to be wise to have the title to all the properties of its constituent companies transferred to the Anaconda. Pursuant to this plan its capital stock was increased from 30,000 shares to 150,000. Propositions were solemnly made by the Anaconda to each of these and as solemnly accepted by a vote of the stockholders of the latter, to give a

certain number of shares of Anaconda stock for all the property of the companies to be absorbed. Thus, in exchange for its stock, the Anaconda acquired the great properties of the Boston & Montana, the Butte & Boston, the Washoe, the Parrot, the Colorado, and the Red Metal, each of which companies, pursuant to the plan, were, by regular proceedings, dissolved. On the dissolution of the Red Metal its Anaconda stock went to the Butte Coalition. The plan either originally contemplated the acquisition of the properties of the Alice as a constituent company of the Amalgamated or it was enlarged to embrace that company as such. However, while the consolidation referred to was going on, the Alice directors, including Ryan, called a meeting of the stockholders to be held May 2, 1910, to consider ratifying and confirming a contract of sale of all the property and assets of that company to the Anaconda for 30,000 shares of its stock.

Record, pages 632, 633.

The ratification duly came from a meeting at which 289,590 shares of the stock were voted for it,

Record, page 342,

all but 3,700 shares being cast under proxies by E. S. Ferry, a member of the firm of Richards, Richards & Ferry, Salt Lake attorneys for the Alice Company. 100 shares standing in his name but actually owned by the Butte Coalition he voted in his own right. 2,200 shares were voted under "substitute proxy" by F. S. Richards, a member of the firm named, and 1,100 shares by Willard Hamer, a clerk in its office,

and 300 shares by D. Gay Stivers, of the legal force of the Anaconda Company, who held a proxy. Of the total affirmative vote, 234,215 shares as stated were owned by the Butte Coalition, the stockholders of record being dummies.

Record, page 618.

Pursuant to this resolution, Ryan, as president of the Alice, being at the same time a director of the Amalgamated and the Anaconda, on May 31, 1910, executed the deed sought to be set aside herein, through which there was conveyed, in form, to the Anaconda all the property of the Alice.

The foregoing brief summary will now be supplemented with further references to the testimony bearing severally upon the propositions relied upon by the appellants.

(1.) *The Sale of the Entire Property of the Alice.*

Authority to dispose of all the property of the corporation notwithstanding the protest of minority stockholders is justified, first, under a statute of the State of Utah, enacted in 1905, and second, under the rule which authorizes majority stockholders to close out the business of an insolvent or failing corporation. Was the Alice such? The company paid dividends regularly from 1881 to 1898, inclusive, except for the years between 1891 and 1896.

Record, pages 380-381.

The properties of the company had been developed to a depth of 1,500 feet.

Record, page 936.

In the old days the ore, silver, was worked by the pan amalgamation process,

Record, page 377,

there being a mill on the premises.

Record, page 374.

After 1894, the property was worked chiefly by leasors or tributors, the water having been allowed to raise first to the 1,000 and afterwards to the 700 foot level. The mill was closed down in 1899.

Record, page 374.

The shaft-house burned down in 1902, and some new machinery was put upon the property to hoist the ore extracted by the tributors.

Record, page 374.

The expenditures in connection with the property were for insurance, taxes, and watching the property.

Record, page 376.

The deficiency was made up through the New York office of the Alice Company,

Record, page 373,

the debt being carried by the Butte Coalition Company, after it became interested March 31, 1906.

Record, page 447.

It amounted to \$27,784.75 at that time, but swelled in three years, nine months, under the new management, to \$34,101.56,

Record, pages 447-448,

including \$1,901.61 expenses of the eastern office, which, by the way, was on the same floor and adjacent to the offices of the Amalgamated, the Anaconda and the Butte Coalition in the city of New York. Of the aggregate indebtedness \$19,575.23 had been incurred in the construction of the new hoist after the destruction of the old one by the fire. More detailed information concerning the property will be set out in connection with the testimony on the subject of value. It is sufficient to say here that the Alice was known to contain large bodies of lead and zinc ores.

Record, pages 374-375.

The properties were adjacent to rich producing copper mines, the veins being worked in them passing, in the opinion of some of the witnesses, into the Alice ground. The stock given by the Anaconda for the assets of the former company was admitted to be worth \$1,200,000 and was claimed by appellees and found by the court to be worth \$1,500,000.

Record, page 145.

(2.) *The Sale for Stock.*

Conceding the right of the majority stockholders of the Alice to force a sale of all the property of the company, it is insisted by the appellants that such a sale, or exchange rather, could not be made for stock in another company, thus transforming the Alice from a mining company to a stockholding company. To this contention it is answered that when a company is authorized to sell all its property in bulk it may, as a part of the process of liquidation, accept

stock in payment, such stock to be converted into cash for distribution among the stockholders, and that the stock in question was accepted as a part of a plan of dissolution of the Alice.

The sale was authorized by a meeting of the stockholders of the Alice held pursuant to a notice which gave no intimation of a purpose to dissolve the corporation.

Record, pages 632-633.

It was accompanied by a letter from the directors which held out as an inducement that various corporations, to wit:

“The Boston and Montana Consolidated Copper and Silver Mining Company, Washoe Copper Company, Big Blackfoot Lumber Company, Butte & Boston Consolidated Mining Company, Trenton Mining & Development Company, Red Metal Mining Company, Diamond Coal & Coke Company, and Parrot Silver & Copper Company (all constituent companies of the Amalgamated), have taken steps to effect a consolidation of all the property owned by them, by a sale of their respective properties to the Anaconda Copper Mining Company, for certain amounts of the capital stock of the Anaconda Copper Mining Company.”

Record, page 444.

The letter continued:

“By the consolidation above referred to the Anaconda Copper Mining Company has acquired the most important mining ground in the Butte District, and it is believed that it will be enabled, through the adoption of general systems of drainage, ventilation, and development, to prospect in an economical manner the undeveloped portion of the property thus acquired.

"This company is the owner of comparatively large areas of mining property which lie contiguous to some of the property belonging to the Anaconda Copper Mining Company, and which it is believed are of sufficient value to justify prospecting and development, provided the same can be carried on by a company strong enough financially to bear the burden of so doing."

Record, page 445.

"You are therefore advised that in the opinion of the management it would be to the best interests of this company and its shareholders to accept the proposition of the Anaconda Copper Mining Company."

Record, page 446.

Nearly a year thereafter a meeting of the stockholders was called to consider a proposition to dissolve the company.

Record, pages 674-675.

(3.) *Identity of Control of Alice and Anaconda.*

At the time of the purchase and since 1906 the Butte Coalition owned a majority of the stock of the Alice.

Record, page 376.

Every director of the latter was a dummy holding the stock that stood in his name for the Butte Coalition, as will appear by the list at page 446, modified by resignations and appointments recited at page 624 and the testimony of the secretary at pages 617-618.

With the notice of the meeting, blank proxies were sent out from the New York office of the Alice, which

was also the office of the Butte Coalition, authorizing either one Thornton or Ferry, heretofore referred to, or *Mr. Kelley, who was the general counsel of the Anaconda Company at Butte*, to vote the shares of the stockholders.

Record, pages 618-619.

Kelley did not attend the meeting, but D. Gay Stivers, another of the attorneys of the Anaconda Company at Butte, did. He held a proxy for 300 shares and voted them for the resolution of ratification.

Record, page 338.

He was made secretary,

Record, page 322,

and a member of a committee to examine proxies.

Record, page 329.

No letter was sent to Mr. Ferry, who did most of the voting at the meeting, instructing him how to vote the proxies which in such generous numbers came into his hands.

Record, pages 619.

Mr. Allen assumes that Ferry got directions either from Mr. Kelley or Mr. Thornton and believes that inasmuch as Stivers attended the meeting "it is very probable that instructions were carried by him."

It will be borne in mind that the Amalgamated owned 50,000 shares of Coalition stock and that the officers of the former became subscribers for its stock upon its organization; that it came into existence to hold the stock of the Red Metal, which was organized

to take over the Heinze properties pursuant to the settlement. The furious contests between the owners of the two groups of properties ceased. The purchase disposed of the litigation.

Record, page 382.

All rights of action by any of the Heinze companies against any of the constituent companies of the Amalgamated were assigned to one T. F. Cole, a close business associate of John D. Ryan, who proposed to release them all, if the Amalgamated would procure to be released all claims which any of its constituent companies had against the Heinze companies or any of their officers.

Record, page 552.

This proposition was accepted and the slate wiped clean.

The suits were all dismissed and none ever after arose between the Amalgamated or any of its constituent companies and the Red Metal.

Record, page 270.

Indeed the attorneys for the Anaconda became the attorneys for the Red Metal (*Id.*), as well as for the Alice.

Record, pages 272, 372.

The superintendent or custodian of the Alice, after the Butte Coalition acquired its stock interest, got his orders from Mr. Gillie, whom he recognized as his superior officer.

Record, page 373.

Gillie had the direction of the mining operations of the Amalgamated companies in Butte.

Record, pages 932, 877.

He sometimes countersigned the checks of the Alice. Sometimes this was done by one Alley, whose office was entered through the general waiting room of the legal department of the Anaconda Company.

Record, page 373.

Value.—The property in question embraces practically a mile of the outcrop of the great Rainbow Ledge, made up of many associated veins. It is traceable by actual workings for miles on the surface, pursuing the course of an arc, from which fact it may have taken its name.

Record, page 724.

It is said by one of the witnesses, without contradiction, to be "by far the largest and most continuous outcrop" in the Butte district.

Record, page 725.

The workings in the Alice ground have been adverted to. Actual mining operations were being conducted on the extension of the Rainbow Lode to the east of the Alice ground in the Poser and the Elm Orlu, owned by Senator Clark, and in the Black Rock, owned by the Butte Superior Company (*Id.*). From both of the former a very considerable tonnage of copper ore has been shipped,

Record, page 395,

and they have both been heavy producers of zinc ore (*Id.*). In the early part of the year 1910, the operations being carried on by the Butte Superior on the Black Rock had reached a stage at which financial success was assured.

Record, page 733.

These claims, and particularly the Black Rock, had been worked for many years for silver, as had the Alice.

Record, page 739.

The zinc ores are now being profitably reduced after much experimentation and the development of new processes.

Record, page 839.

These made such ores a commercial product in the Butte camp for the first time in 1910.

Record, page 786.

The works of the Butte Superior are capable of treating 1,000 tons daily.

Record, page 811.

The Alice is known to contain such ores in great abundance. Very considerable bodies were encountered in the operations conducted therein,

Record, page 898,

but they were left undisturbed because the presence of zinc interfered with the successful treatment of silver ores by the processes in vogue in the old days.

Record, pages 890, 832-833.

Samples of these ores taken from above the 600-foot level,

Record, page 888,

showed a very small percentage of copper.

Record, pages 906-907.

In veins intersecting the Rainbow within the Alice ground pursuing a northwesterly-southeasterly direction, hereafter to be referred to, great copper producers, ore in commercial quantities, are rarely found above the 1,000-foot level. In the opinion of an expert examined by appellants copper bodies will be found in the Alice.

Record, pages 731, 749.

The history of the Butte district shows that veins worked for silver near the surface became copper producers with depth,

Record, pages 732, 757,

the theory being that the copper has leached out down to the point where the oxidization ceased.

Record, page 757.

Another expert examined by the appellants, of wide experience and renown, Walter Harvey Weed, testified that copper ore would be found in the Alice ground and in the Rainbow Lode. He had been engaged at some work about Clark's Elm Orlu and had seen as much as 150 tons per day of high-grade copper ore taken from that claim and from the Rainbow Lode.

Record, page 800.

He had learned from old statements concerning the Alice that copper was found in the lead-silver ores, a feature that was embarrassing in the smelting operations, to the amount of 1.1 to 2 per cent, giving them a value for the copper content under modern processes.

Record, pages 800-801.

“Finding copper ores of value in the Rainbow Lode,” is, in his opinion, “a geological probability.”

Record, page 811.

But he would first conduct explorations to find copper in the veins which enter the property from the southeast.

Record, page 802.

Two of these known as the Jessie Vein and the Edith May Vein have been extensively worked for a long distance to the southeast and to great depths, over 3,000 feet. The former is being worked very extensively and profitably in the Badger State claim, an Anaconda property, shown on the map to be in close proximity to the Alice ground,

Record, page 729,

and a shaft has been sunk on the Moose, another Anaconda property, a small fraction contiguous to the property in question here, probably on one or the other of the veins above named.

Record, pages 730, 815.

The Badger State is one of the greatest producers

in Butte, yielding more than 10,000,000 pounds of copper in 1913.

Record, page 441.

This great mine developed within 500 feet of the Alice ground was opened up during the period between the acquisition of the Alice stock by the Butte Coalition under the Ryan option and the time when the transfer in controversy was effected. In the report of the Boston & Montana Company for 1909 occurs the following:

“This shaft (the Badger State shaft) had, on December 31st, 1909, reached a depth of 1,548 feet, and has been sunk in the northwestern portion of the Butte Camp, in order to develop the Badger State and Auraria claims owned by this company. The ore bodies have no connection whatsoever with those that have been developed by the shafts already mentioned, but the work thus far done, gives promise of very gratifying results.”

Record, pages 575-576.

The bright promise it held out continued undimmed for, in a later report, either for the year ending April 30, 1910, or April 30, 1911, it was said:

“This shaft is situated in an entirely different section of the Butte Camp from that in which are located the shafts which have been reported under the heading of the Boston and Montana Department; as it lies in a northwesterly direction from them, and distant several thousand feet. It is now eighteen hundred feet in depth, two hundred and eighty-three feet having been sunk during the year. Stations have been established at the thirteen hundred, sixteen hundred and eighteen hundred foot levels, and several veins of great promise have been developed, showing good

widths, and a grade of ore higher in copper values, and carrying an average silver value, greater than that of any of the other mines. *There is a general opinion among those familiar with this property, and its development, that it is destined to become one of the great mines of the district. Development work is being pushed with vigor.*"

Record, page 577.

"The Jessie vein is open to probably within 500 feet of the Alice ground and the Edith May much closer than that," according to the testimony of Reno Sales, geologist for the Anaconda Company.

Record, page 925.

It is cut in the Badger State claim on the 200 level and on the 1,000 level.

Record, page 929.

The report for 1912 shows that the greatest values in that claim were encountered on the 1,600 and 1,800 levels.

Record, page 578.

They were still going down. Development progressed with very gratifying results, the average daily output for the year being 550 tons.

Record, page 579.

In the same report the shaft in the Moose, still west of the Badger State and contiguous to the Alice property, was the subject of the following mention:

"Many years ago, the ground adjacent to the Moose shaft, lying in a westerly direction from the Badger State mine, was worked to a depth of five hundred feet with fair success for ores, carrying silver values only. During the year 1913, it is proposed to start

sinking the Moose shaft to a depth of eighteen hundred feet, and to prospect the veins at greater depth. This shaft can also eventually be connected with the Badger State workings, and will be of great assistance in perfecting ventilation."

Record, pages 579-580.

There has been a very material expansion of the copper producing area of the Butte district and in the direction of the Alice ground in more recent years.

Record, page 792.

Some evidence was introduced on behalf of the appellees to show that the zinc ores of the Alice are refractory in character and the metallurgist of the Butte and Superior Company, a gentleman to whom much of the success of that company is due, testified, as a result of tests, made by him, that ores such as samples provided him, from the upper levels of the Alice could not, in his opinion, be worked at a profit,

Record, page 868,

but he admitted that his company struggled along for six years before he came to it in an effort to perfect its methods of treating the Butte Superior ores, without making a success, and that most satisfactory results had since been obtained because of the improvements in the system of treatment of the ores.

Record, page 873.

He thought it possible that at some future time the Alice ores could be treated successfully.

Record, page 873.

Dr. Weed, however, expressed himself as of the belief

that the zinc ores of the Alice mine can be successfully worked by existing processes.

Record, pages 789-823.

An attempt was made at one time to treat these zinc ores of the Alice, with what skill or command of metallurgical science does not appear, but the plant burned down and the effort was abandoned.

Record, page 418.

Since the Anaconda acquired the property it provided two different zinc companies with samples of the ores for experimentation, but they both reported unfavorably and efforts to induce "practical zinc people," Mr. Ryan testified, to take a lease of the property had failed.

Record, page 420.

The Anaconda itself never did any experimentation.

Record, page 398.

The reports from the two companies said to have reported were not offered, nor were the terms upon which lessors were invited to take hold of the property disclosed.

No opinion was ventured by any witness for the appellees as to the value of the property, though the president of the Anaconda, its superintendent of mines and its geologist testified.

As a step in the consolidation through which the title to all the properties was united in the Anaconda, three experts were sent out to examine them. They

made a report, which presumably embraced the Alice and must have placed either an absolute or a relative value upon the properties of the companies respectively.

Record, page 408.

The report was not produced, though called for, nor was any one of the three called upon to testify.

Dr. Weed and the other expert called by the appellants on the subject of value, Mr. Corry, both testified that the properties of the Alice at the time of the sale were worth \$3,000,000, the latter fixing the value at $3\frac{1}{4}$ millions.

Record, pages 791-734.

Both say, however, that in view of conditions they would have advised against selling at that time, for various reasons, among others, that development of great importance was going on in adjacent properties, the producing area was being gradually extended in the direction of the Alice properties, mining methods were being improved and cost of extraction and reduction being reduced and metallurgical processes and particularly those for the treatment of zinc ores being discovered and developed.

Record, page 791.

(4.) *The Sherman Law.*

The Amalgamated Copper Company acquired on its organization with a capital stock, speedily raised to \$75,000,000, the majority of the stock of the Anaconda, the greatest copper company in the world, a

majority of the Parrot, and all of the Washoe and the Colorado.

These were all highly prosperous companies, engaged in mining and smelting copper ores and in shipping the product to the ends of the earth, where it was sold through some commission house. It acquired as well all the stock of the Diamond Coal and Coke Company,

Record, page 409,

supplying coal to the mines and smelters, all of the stock of the Big Blackfoot Milling Company, providing timber for them, and the stock of the Hennesy Mercantile Company operating a great department store in trade with the miners. It took in quite an additional bunch of companies subsidiary to the Anaconda engaged in various mercantile lines and profitable because of the operations of that company, for all of which it paid the \$75,000,000, the purchase being authorized at a meeting held April 27, 1899, one William S. Bogert lumping off the whole collection at that figure to the new organization.

Record, pages 491-492.

On September 21, 1899, it acquired 42,000 shares more of Anaconda,

Record, page 546,

and on December 21 the purchase of 54,000 more shares of Anaconda was authorized and 10,000 shares of Boston & Montana, next to the Anaconda in point of production among the copper companies of the world.

Record, page 509.

Where the money came from to make these later purchases is not disclosed, the ledger of the company—No. 1, covering the period from 1899 to 1905—having in some unaccountable manner disappeared.

Record, page 510.

The recital above, sustained by repeated declarations emanating from the Amalgamated, that all of the Colorado stock was acquired, is not altogether accurate, for it appears that as one of the last acts of a meeting held May 22, 1899, the treasurer was authorized to purchase 17,354 shares of Colorado “not already acquired” for a trifle of a half of a million or so,

Record, page 501,

from which we gather that all the stock mentioned at pages 485 and 486 above referred to, or at least the Colorado stock, had been acquired. However, at the April 27th meeting, the National City Bank was authorized to receive subscriptions for the entire issue of the capital stock except ten shares,

Record, page 498,

whereupon it forthwith put out a notice to the effect that the company had “already purchased large interests in Anaconda, Parrot, Washoe, and Colorado,” and asked for subscriptions to the entire issue of the capital stock of the company.

Record, page 707.

Just how it had acquired these large interests before it had a dollar and was prepared to say, simultane-

ously with its request for subscriptions for all its stock, that it had already secured such interests, it is perhaps unnecessary to inquire.

But it started off master of more productive copper properties than was ever before brought under one control.

In 1901 it acquired the great properties of the Boston & Montana and the Butte & Boston, by the purchase nominally from Kidder, Peabody & Company of more than a majority of the stock of those companies,

Record, page 521,

increasing its capital stock to take them in to \$155,000,000,

Record, page 541,

when it had practically all there was in Butte save the Heinze and Clark properties. The former it in effect acquired, in manner hereinbefore set out, on the settlement of the litigation in 1906, paying \$10,500,000, and eventually by transfer to the Anaconda, and the latter in 1910 by purchase for \$5,000,000 more. At the time the depositions were taken its investments totaled \$184,000,000 odd.

Record, page 550.

In 1899 when the Amalgamated came into existence, the Butte camp was producing nearly half of the copper output of the United States, 238,000,000 pounds approximately, out of a total of 581,000,000.

Record, pages 291, 290.

1. The annual production of its constituent companies at that time was as follows: Anaconda, 120,000,000; Boston-Montana, 63,000,000; Butte and Boston, 12,000,000; Colorado Smelter, 10,000,000; Parrot, 15,000,000; total, 220,000,000.

Record, page 713.

In 1910 the total production in the United States was 1,086,115,430 pounds, of which Montana contributed 288,449,425.

Record, page 291.

In 1911 other producers in Butte put out not to exceed 42½ million pounds,

Record, page 292,

less than 15 per cent of the total production. 30,000,000 pounds of the 42½ millions were produced by the North Butte Company, organized by Ryan and Cole. On its organization H. H. Rogers, president of the Amalgamated, subscribed for \$100,000 of the stock.

Record, pages 403-404-405.

In view of the statement of Ryan in the course of the testimony just referred to, it would seem that he is misquoted at page 385, where he is represented as saying that he had nothing to do with the organization of the North Butte.

The reports of the Amalgamated tell of harassing apex suits in Butte, but it never had any serious trouble with the North Butte.

Record, page 390.

The story of the acquisition of the Heinze properties has been told in sufficient detail. The Clark properties, like those of the Alice, were acquired while the consolidation was going on which vested the title to all of them in the Anaconda. The actual transfer was made June 1, 1910, though the purchase occurred a few months before that date.

Record, page 405.

This purchase was made while there was pending a controversy between Clark and the Amalgamated such as to call for the activities of engineers and lawyers in connection with it.

Record, pages 390-391.

An attempt is made to justify the consolidation of 1910 on the basis of economy and for the purpose of eliminating apex controversies.

Record, pages 310-315.

None whatever is offered for the consolidation brought about by the organization of the Amalgamated.

As to the apex controversies, they seemed to have been adjusted without difficulty and the constituent companies never got into court because of them.

One of the appellants testified to a conversation with Mr. Kelley, general counsel for the Anaconda Company, in which the latter said, apparently apropos of the consolidation then going on, that the Federal Government is opposed to holding companies.

Record, page 691.

Though Mr. Kelley was examined as a witness he made no reference to this testimony.

When the Amalgamated got control of the stock of those companies, respectively, it dismantled the smelters at Butte of the Parrot in 1899, the Butte & Boston in 1901 or 1902, and the Colorado in 1905.

Record, page 289.

Similarly the Montana Ore Purchasing Company smelter, a Heinze plant, went out of commission when the famous litigation was settled and the properties with which he was associated passed to the Red Metal. And so the Butte Reduction Works, otherwise known as the Clark smelter, when his copper properties went to the Amalgamated. No copper smelters are left in Montana save the two owned by the Anaconda, one at the city of Anaconda and the other at Great Falls, and one at Butte owned by the Pittsmont Company.

Record, page 289.

The story of the purpose with which the Amalgamated was organized is told by Thomas W. Lawson, a witness examined for the appellants, as follows:

“In the work of organizing that company, I was associated with the late Henry H. Rogers and Albert C. Burrage. The company was organized in the month of April, 1899; I should say from memory that I had been conferring and negotiating with those gentlemen and others for three years before that time. Upon the organization of that company, there was turned over to it a controlling interest in a number of mining corporations; the stocks of which were acquired from the promoters of the com-

pany. I had a part in the purchase of some of the stocks, which were thus eventually transferred to the company on its organization. The particular companies whose stocks we were actively engaged in securing immediately prior to the organization of the Amalgamated, I should say were the Anaconda, Boston & Montana, Butte & Boston and the Parrot. Speaking generally, our plan was this: We intended to purchase the controlling interest in certain producing copper mining companies, those I have particularly named and others. I distinguish between the two because we did purchase some and abandoned the purchase of others, the purchase of which was contemplated at the beginning. Our intention was to put them into a consolidation, amalgamation—into some larger holding corporation to be organized later, for the purpose of more advantageously and profitably conducting the copper business; conducted separately at that time by the different companies we were to absorb, or hoped to absorb. Other companies we intended to absorb were the Calumet & Hecla, and Osceola, and some properties of which I cannot recall the names, controlled or owned by Senator Clark at Butte; and some other copper companies in the Lake Region; also the Arcadia and Isle Royale. The advertisement in the Boston Herald of May 8th, 1899, over my signature contained the following statement:

“The Amalgamated Copper Company is the company into which is to be merged all sound producing copper companies that are now paying and after close investigation prove good and will pay in the future over 8 per cent on the par value of the stock which the Amalgamated Company issues.”

“It accurately states the purpose as it was developed in the course of my negotiations with my associates. I do not believe we intended at that time to purchase the United Verde. If we could have purchased, we would have been very glad to get it, but we feared at that time we would not be able to purchase the property from Senator Clark. Generally

speaking the plan contemplated the acquisition of all producing copper mines in this country, which we might be able to purchase upon any reasonable terms. We intended to purchase all of the stock of each company, in which we could purchase a controlling interest, if it were possible and feasible. I think we also talked of acquiring the Rio Tinto. In the article which appeared in 'Everybody's' for the month of October, 1914, written by me, there appears the following statement:

" 'In 1896 I formulated and perfected the plans for "Coppers," a broad and comprehensive project having for its basis the buying and consolidating of all the best producing copper properties in Europe and America, and educating the world to their great merits as safe and profitable investments'; which states succinctly the plan which I had in mind. A fair statement of our purpose appears in the New York "Sun" of April 28, 1899, in the article headed "Here's the Copper Pool," as follows:

" 'The copper combination materialized yesterday. The new company will combine nine copper mining companies. Its purpose will be so far as possible to give stability to the copper market. It is not proposed to advance prices but rather to prevent an undue advance, as by keeping the prices upon a fair basis it is believed that the demand for the metal will be fostered and the profits of the company be all the greater. Economies in the business will be instituted.' "

Record, pages 700-702.

In the year 1911 the Amalgamated acquired all of the stock of the United Metals Selling Company, since its organization the greatest copper selling agency in the world. It sold for the Amalgamated.

Record, pages 408-409.

Mr. Lawson tells of its coming into being thus:

"I know about the United Metals Selling Company. It was organized about the same time or shortly after. The principal business was the old copper selling agency business of the Lewisohns. Their business was taken over, I think, as a whole and it was made the basis of the new selling agency. This company had contracts with a number of the larger producing copper mining companies, contracts to sell their metal for them—finance them during the selling of it, give them credits, and in a general way what is known as the copper selling agents business, charging a commission for the work done. I think the Amalgamated Copper Company became the owner of some stock—the controlling interest—in the United Metals Selling Company. Subsequently I think it acquired all of it. The organization of the United Metals Selling Company was in contemplation at the time of the organization of the Amalgamated Copper Company, as a part of a general scheme to market the copper to a finality. My article in 'Everybody's' heretofore referred to, states the case, the conditions, about as they were as follows:

"'On the board of directors, too, was Governor Flower of the financial and brokerage house of Flower & Company, who had acted as fiscal agents for the corporation at its formation, nor must I forget the Lewisohn Brothers, who had been induced to turn in all their copper business at actual cost to be incorporated in the United Metals Selling Company, a part of the Amalgamated scheme, but not included in the corporation, and every one of these had elaborate assurances that he was in on the cellar floor.'

"As regards the reason for acquiring the selling agency, I will say that in the carrying out of our general scheme, the general scheme which was contemplated all the way through, it would have been very essential to have the marketing of the whole product of the different mines controlled or owned by the con-

solidated company, as the very foundation idea of the whole scheme was the control of the price of the metal, control to an extent that we could keep the price from the wild fluctuations that had been the history of copper metals from the beginning. In other words, a control that would have enabled us to establish a fair price and to hold that fair price through the ups and downs of general business, through the periods when the metal would be in strong demand, when the demand would let up, and there would be accumulation or overproduction, a temporary overproduction, and the very essential of that would be a control in the sense which I stated, of the selling, of the getting the metal to the consumer."

Record, pages 702-704.

The delay about taking over the stocks of the Boston & Montana and the Butte & Boston, Mr. Lawson explains in the following testimony:

"The original acquisition of its assets by the Amalgamated did not include any of the stock of the Butte and Boston or the Boston-Montana, but we had, prior to its organization, secured a considerable amount of the stocks of these companies for the people who were organizing the Amalgamated. At that time in Montana, the management of the Butte and Boston and Boston-Montana was harmonious with the management of the Amalgamated. The reason that the Amalgamated did not acquire immediately upon its organization the stocks of these two companies was that in the beginning and up to within a comparatively short time of the organization of the Amalgamated company, we had intended to have the Boston and Montana, and Butte and Boston stocks the first stocks to be absorbed, but in the meantime Mr. Rogers had been able to acquire from Mr. Marcus Daly the control of the Anaconda property, which had not been originally contemplated, or the control of which had not been originally contemplated, until

after the Boston-Montana and Butte and Boston had been arranged for; and that would necessitate a larger amount of capital at the start, than Mr. Rogers and Mr. Rockefeller and some of our associates thought was advisable, so in a general way it was decided to bring the contemplated Amalgamated property to the public in sections, and what was to have been the first section was shifted to the second, so that in the first section could be included this large amount of Anaconda. They had secured a control of the Butte property. They had not purchased the control of the Boston-Montana, but could speak for the control of it—options in some cases, and friendly relations with the larger holders in others.”

Record, pages 704-705.

The leading spirit or master mind in effecting the consolidation was Henry H. Rogers.

Record, page 706.

On perfecting the plans to bring out the Amalgamated, Lawson, on the suggestion of Rogers, and two other associates, wrote out and caused to be inserted in the “New York Sun” and the “Boston Herald” an advertisement signed by Marcus Daly, H. H. Rogers, and Wm. G. Rockefeller, inviting subscriptions to the stock of the Amalgamated. The attention of the witness was called to the following from Moody’s “The Truth About the Trusts:”

“While the result turned out far otherwise, in the original plan both judgment and sanity prevailed, for it was purposed not merely to form a combination of a few of the larger producers embracing a copper production of only about 150,000,000 pounds per annum out of a total of about 1,200,000,000 pounds as the world’s production, but to logically proceed from this nucleus to a much larger trust which would first

perhaps take in the United Verde, Calumet & Hecla, and every large copper mining interest in this continent and extend ultimately to other continents, embracing the Rio Tinto properties of the Rothschilds as well as all other important producers. In the carrying out of these plans it was estimated that to acquire approximate control of the entire copper production of the world, about 1,200,000,000 pounds per annum, would involve the issuance of an approximate share capital of \$1,200,000,000, thus capitalizing copper production at the rate of one dollar for each pound of copper produced. The original formation of the trust was, therefore, based on a sound proposition from the standpoint of its promoters and on the only broad rational basis, that any trust that contemplates the issuing of watered capitalization in large amounts can be based on, and be successful. It aimed at and saw the necessity for acquiring a monopoly of the copper production of the world, the purpose being to restrict the production to what might be the legitimate at about twenty-two cents per pound."

Record, pages 714-715.

Of this statement he said:

"That is a fair statement of facts, with quite a decided stretching, perhaps, of conclusions. I do not agree with the trust—where they bear down on the trust end and the restrictions, etc., as I think they are wrong there. We did intend to capitalize the copper of the world on about a dollar a pound basis, which we believed to be a fair one, and I believe so yet."

Record, page 715.

No testimony was offered by appellee to overcome the foregoing from one who undeniably was concerned in bringing the Amalgamated into being, but the appellants having called one Albert C. Burrage,

likewise participating, an effort was made to draw from him some vindictory expressions. How successful this attempt was may be shown to the court by appellees.

In the year 1905 the Amalgamated sent out to its stockholders a statement from which the following is taken:

“The Amalgamated Copper Company was organized in April, 1899, with a capital stock of \$75,000,000. For three months prior thereto, copper was selling at between sixteen and seventeen cents a pound, and there was no accumulation of stocks in the hands of the producers. Scarcely any new discoveries of copper had been made in the United States for several years, and the uses of the metal were so rapidly increasing, especially in the electrical field, that the most experienced observers of the market were of the opinion, that the price of the metal would not again fall under fourteen cents a pound, until new and extensive sources of supply were developed, of which there was then no present indication.”

Record, page 582.

Whatever may have been the limits within which its projectors intended the Amalgamated should operate, it early acquired extensive interests in Arizona and Mexico, holding stock in the Inspiration and Greene Cananea.

Record, page 512.

Its successor, the Anaconda, has more recently acquired a stock interest in the International Smelting and Refining Company, owning or controlling, through stock ownership, a lead and copper smelter

in Utah, a copper refinery in New Jersey and a lead refinery in Indiana.

Record, pages 860-861.

These acquisitions contemplate a further issue of Anaconda stock to the amount of the purchase price, as stated (*Id.*).

The Boston & Montana paid dividends at the rate of 172 per cent of the par value of its stock the year before it was absorbed,

Record, page 537,

and the Butte & Boston 50 per cent besides reducing its indebtedness materially.

Record, page 538.

Upon the foregoing the appellants make the following:

II. Specifications of Error.

I.

It was error for the court not to find that the transfer of the property of the Alice Gold and Silver Mining Company to the Anaconda Copper Mining Company was in violation of the Sherman Anti-trust Act.

II.

It was error for the court not to hold and find, and so decree, on the record and on the evidence submitted that the deed transferring the property of the Alice Gold and Silver Mining Company to the Ana-

conda Copper Mining Company was null and void on account of the transfer of the property being in violation of the Sherman Anti-trust Act.

III.

It was error for the court to hold and find and decree accordingly that it was within the right and within the authority of the Alice Gold and Silver Mining Company to sell all of its property as against the protest and dissent of any or a minority of its stockholders.

IV.

It was error for the court to hold and find that the sale of the property of the Alice Gold and Silver Mining Company could be made, receiving as a consideration therefor stock of the Anaconda Copper Mining Company, thus transforming the Alice Gold and Silver Mining Company, which was a mining corporation, into a stockholding corporation.

V.

It was error for the court not to hold and find and so decree that the sale of the property by the Alice Gold and Silver Mining Company to the Anaconda Copper Mining Company was null and void because of substantial identity of parties who negotiated and carried out the sale of the property, and the parties who negotiated and carried out the purchase.

VI.

It was error for the court to hold and find and so decree that there was not such substantial identity of

parties carrying out the sale of the property, and negotiating and carrying out the purchase of the property.

VII.

It was error for the court not to hold and find that the purchase of the property by the Anaconda Copper Mining Company was made in the pursuit of a purpose for which the Anaconda Copper Mining Company was carried on in behalf of the Amalgamated Copper Company, namely, to monopolize the production of copper in the Butte camp and the sale of the same in the markets of the world in violation of the Sherman Anti-trust Act, and that the Anaconda Copper Mining Company in the purchase of the property under consideration was influenced by that purpose and that object.

VIII.

It was error for the court to hold and find and decree accordingly that the sale of the property of the Alice Gold and Silver Mining Company to the Anaconda Copper Mining Company should stand, unless a higher price could be obtained for same at public sale than was obtained from the Anaconda Copper Mining Company.

IX.

It was error for the court not to hold and find and decree accordingly that the sale by the Alice Gold and Silver Mining Company to the Anaconda Copper Mining Company was unconditionally null and

void; so that the title to the property would, without condition, be revested in the Alice Gold and Silver Mining Company.

X.

It was error for the court to hold and find and decree accordingly that a public sale of the property in question should again take place through the agency of a master appointed for that purpose, and that bidders should deposit certified checks, as provided for, or their bids should not be considered, and that unless their bids exceeded the price paid for the property by the Anaconda Copper Mining Company they should not be considered, and that the sale of the property to the Anaconda Copper Mining Company should stand.

XI.

It was error for the court to hold and find and decree accordingly that a resale of the property should take place instead of holding and finding and so decreeing that the deed conveying the property to the Anaconda Copper Mining Company was null and void.

XII.

It was error for the court to hold and find and so decree that a resale of the property should take place, and that if a price upon such resale was not obtained in excess of the price paid for the property by the Anaconda Copper Mining Company, that the sale made to the Anaconda Copper Mining Company should stand.

XIII.

It was error for the court to order and decree that the sale and transfer of the mining ground and premises and property of the Alice Gold and Silver Mining Company to the Anaconda Copper Mining Company had on or about the 27th day of May, 1910, be affirmed and be valid and binding.

XIV.

It was error for the court to hold and find and so decree that the Anaconda Copper Mining Company got good and valid title to the property of the Alice Gold and Silver Mining Company on account of the sale and transfer of said property made on or about the 27th day of May, 1910.

XV.

It was error for the court to hold and find and so decree that the Anaconda Copper Mining Company as against the Alice Gold and Silver Mining Company is the owner of the mining ground and premises covered by the transfer of the 27th of May, 1910.

XVI.

It was error for the court to hold and find and so decree that the complainants were not entitled, as a portion of the costs in the pending litigation, to reasonable attorney's fees.

III. Argument.

I. *Is the Sale of All the Alice Property Justifiable?*

Confessedly the rule at common law is that neither the directors nor any number of stockholders less than all have any power to dispose of all of the property of a corporation.

Forrester *vs.* B. & M. Co., 21 Mont., 544.

III Thompson's Com. on Corp., 2421.

VII Thompson's Com. on Corp., 8356.

Noyes on Intercorporate Relations, secs. 114, 281.

The rule as stated in these authorities is, as it is understood, admitted by the appellees, and the appellants, upon their part, admit that it is within the power of the directors and a majority of the stockholders of an insolvent corporation or a corporation in danger of insolvency to convert all of its property into cash, with a view to the division of the remainder among the stockholders and the dissolution of the company; in other words, a sale of all of the property of a corporation that is insolvent or threatened with insolvency may be made as an incident to the winding up of its business. The conditions authorizing the sale can be gathered from the following quoted in the opinion in the Forrester case from that filed in *Treadwell vs. Manufacturing Co.*, 7 Gray, 393, to wit:

“Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders, for the sale of the corporate property, and the closing of the business of the corporation, was

justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances, it was in furtherance of the purposes of the corporation to pay their debts, close their affairs, and settle with their stockholders on terms most advantageous to them."

It will be noted that in that case the corporation was without capital and *without the means of procuring it*, and the concluding paragraph shows the purposes for which the sale is authorized. With reference to that case, after quoting as above, the Montana court, speaking through Mr. Justice Pigott, says:

"In that case, as in *every one cited by the defendants*, the corporation was unable further to prosecute the purposes for which it was created."

But in this connection a distinction must be drawn between a losing corporation and one that is insolvent or threatened with insolvency. The bare fact that in the way the business of the company has been conducted it does not produce a profit, does not justify the majority of the stockholders in abandoning the purpose for which the corporation was organized and winding it up.

Noyes on Intercorporate Relations, sec. 112.

The following quotation is made from the opinion in a recent case,

Butler *vs.* New Keystone Copper Co., 93 At.,
380-383,

namely:

“If the business be unprofitable and the enterprise hopeless, the holders of a majority of the stock may, even against the dissent of the minority, sell all the property of the company *with a view to winding up the corporate affairs*. Cook on Corp. (6th ed.), 670; Thompson on Corp. (2d ed.), 2421, 2424. See note in 35 L. R. A. (N. S.), 396, where many cases are collected.”

Repeated assertions were made in the argument before the lower court that the property of the Alice Company was practically worked out, that it was neglected and allowed to go to ruin, and that it was practically abandoned by its owners as wellnigh worthless; that the company was in debt for the care of the property to an amount aggregating \$34,000 or thereabouts, and that it was without means to discharge its obligations; but neither the evidence supposed to give foundation for these comments, nor the comments themselves, can obscure or disguise the fact that the appellee Anaconda Copper Mining Company gave for the property what the appellants aver was the equivalent of \$1,200,000, and which the appellees themselves assert was worth \$1,500,000. It can scarcely be said that a company having property worth from \$1,250,000 to \$1,500,000, and owing \$34,000 is either insolvent or in danger of insolvency.

The contention made by appellees in this behalf was not urged with the fullness before Judge Bourquin with which it was made before Judge Hunt, who dismissed it as quite untenable. After reviewing the history of the property, he said in the course of his opinion:

“It cannot be said that the Alice Mining Company was insolvent, though it appears to have been a losing corporation. However, no effort, other than the sale under investigation, appears to have been made to sell the property or to finance the company so that it could operate, or to dismiss the debt of \$34,000 due to the Butte Coalition Company, nor is there anything to show that the Butte Coalition Company was seeking to collect the debt. The property seems purposely to have been kept idle for years past. Nor does it appear that efforts to exploit the property were recently made. Surely a property which sold for the equivalent of \$1,300,000 would have had little or no difficulty in raising \$34,000 due to another corporation.”

Record, page 170.

In this connection, however, the attention of the court may be directed to two pertinent items of evidence in the record.

First. It is not even intimated in the circular sent to the stockholders asking ratification of the sale which the directors had already agreed upon that the company was either insolvent or in danger of insolvency, nor was it suggested that the sale was necessary because of such condition. The mind must be closed to the perfectly obvious facts of the case to indulge in any such assumption. Reference was indeed made to the balance sheet made part of the circular which showed an outstanding indebtedness, trifling in amount, however, as pointed out by Judge Hunt, in comparison with the conceded value of the property, but it was not even suggested that the creditor—which, by the way, was the Butte Coalition, the largest stockholder—was importunately demanding liquidation or that even a request for payment

had been made. The transfer was recommended because machinery and equipment were required to do development work and to treat the ores which the prospective purchaser was able to supply and which the Alice Company could not provide for want of means. The conveyance was further recommended because like action had been taken by a large number of other companies referred to in the circular and the hope was held out that the stock of the Anaconda, so well able to make the expenditures necessary to the economical working of the property and the reduction of the ores which might be extracted from it, would prove much more remunerative than the property had been or would be likely to be if it continued in the ownership of the Alice.

Second. The testimony of Mr. C. F. Kelley forbids the belief that the property was sold either because it had not paid or because the company was unable to meet its obligations. A plan was formed, by whom it is now immaterial to inquire, to consolidate the properties of the Amalgamated companies. It apparently embraced those of the Red Metal Company, whose stock was owned by the Butte Coalition, but did not include the Alice. It was a part of the plan, it is now asserted, to dissolve the various companies, but the Butte Coalition owned the major part of the stock of the Alice, and it became necessary to widen the scope of the consolidation plan to take in the latter that the Butte Coalition might be dissolved when the Anaconda stock should be distributed.

Record, page 852.

Mr. Ryan tells tersely the story in this sentence :

“The Alice property was bought at that time simply because this other consolidation plan was going through and the Alice Company was without means to develop its own property and I was anxious to have the Anaconda take it over and enter upon its development.”

Record, page 405.

That was why the transaction was entered upon—the distressed financial condition of the Alice is an after-thought urged because of what seems the legal necessities of the case.

When the Ryan option on the Walker stock was taken up, the indebtedness of the Alice amounted to about \$27,000, which probably included the cost of the construction of a new hoist after the destruction of the old one by the fire. The new owners increased the debt somewhat more rapidly, incurring nearly \$2,000 of it for expenses of the eastern office, the necessity for which is not made obvious by the testimony, but the aggregate was inconsequential and the Butte Coalition appeared to be carrying the load without any complaint, as the Walkers had done when they were in control.

If, however, the affairs of a corporation get into such condition as that a sale of all of its property is justified, that sale must be made *for a pecuniary consideration*, as a step towards the liquidation of the company. Noyes says:

“Transfer of Entire Corporate Property Without Unanimous Consent Requires Monetary Considera-

tion.—Upon the winding up of the affairs of a corporation, every stockholder has a right to insist that the property of the corporation be converted into money and that the proceeds be distributed. He has a right to require the valuation of the corporate property to be fixed by a sale.

“Similarly, it is the right of every stockholder to demand that sales of corporate assets made preliminary to, and for the purposes of, liquidation shall be for money. He cannot be compelled to accept ‘chips and whetstones’ instead of cash. Whether the exchange of one species of property for another is even a step towards liquidation depends entirely upon their comparative marketableness. An exchange is not a sale.”

Noyes on Intercorporate Relations, 118.

The learned trial judge tersely expressed at the hearing the rule in these words, “The corporation can sell, but it cannot swap.”

This doctrine was announced in substance in the Forrester case.

As indicated above, the court recognized that a sale of all of the property of the corporation might be made, its language being as follows:

“As we have said, at common law, the directors (at least with the consent of the majority of shares) may sell the entire corporate property *when the exigencies of a waning business require such action*,”

but this does not justify anything but a sale, and, accordingly, the court refused to recognize the validity of a transfer in exchange for stock of another company. Touching that feature of the case, the opinion says:

“Manifestly the transfer proposed lacks an element necessary to constitute a sale, namely, a pecuniary

consideration. To constitute a sale there must, as a general rule, be a consideration in money."

This whole subject of the right of a corporation to transfer all of its assets is the subject of an extensive note to the case of

Tanner vs. Lindell Ry. Co., 103 Am. St., 548,

to which the court is respectfully referred.

It is argued, however that the sale of *all* the property of the corporation is justifiable under a doctrine asserted in certain cases of which

Lang vs. Reservation M. & S. Co., 93 Pac., 208,

may be considered as representative. With it is grouped

Traer vs. Lucas Prospecting Co., 99 N. W.,
290.

This last-mentioned case is invariably mentioned in support of the general proposition asserted by some courts that the right to sell all the property of a corporation exists notwithstanding the protest of minority stockholders. It does not stand for the non-existence of such right except in exceptional circumstances. The general rule is against the doctrine of that case. Judge Pigott says in the *Forrester* case that there is no conflict in the decisions, that they all recognize the general principle that the assent of all stockholders is necessary to a sale of *all* the property of the corporation. His language is—

“Our attention is called to certain decisions which are said to recognize a contrary doctrine, but examination discloses no conflict of opinion among the courts of last resort.”

And then, after referring by way of example to *Treadwell vs. Manufacturing Co.*, 7 Gray, 393 (a case by the way made the subject of comment in the brief of defendants, he adds,

“In that case, as in every one cited by the defendants, the corporation was unable farther to prosecute the purposes for which it was created.”

He was not justified in saying there is “no conflict, etc.” Some few courts, it must be admitted, have announced the existence of a general power though in all of them, perhaps, insolvency, in fact, existed, so that the judgment was right though the reasoning was wrong.

It is worthy of note that Judge Hunt, as Associate Justice of the Supreme Court of Montana, concurred in the opinion in the *Forrester* case and it may be remarked that the opinion filed by him herein discloses that he did not tolerate the idea that the present case fell without the general rule announced by Judge Pigott.

But in practically every collection of cases dealing with the subject, notes, text-book declarations, etc., *Traer vs. Lucas* is cited as announcing a doctrine opposed to that supported in the *Forrester* case.

The *Lang* case may be profitably considered. In line with it is a later case in the Supreme Court of Washington,

Smith vs. Flathead River Coal Co., 119 Pac.,
858.

In both of these cases the corporation had been reduced to such circumstances as justified a sale to save something out of the wreck of a business. But the articles in each case conferred not only the common-law powers of purchase and sale that attach to any business corporation, but also the right to “*deal*” in mines and mining property. The Alice Company was invested with no such power by its articles. In view of that provision in its charter, the court said of the corporation whose acts were considered in the last-above cited:

“It was a speculating and prospecting corporation, etc.”

If it was given power to operate mines, it was likewise given power by the significant word referred to, which the court does not omit to quote from the articles in each of the cases, to engage in the business of buying and selling mines. In *Smith vs. Flathead* it is said,

“There is no showing that the sale disrupts the corporation or that *the proceeds will not be invested in other enterprises* consistent with the articles of incorporation.”

And in the Lang case occurs this language:

“In the case before us the sale does not disrupt the corporation, nor is it contrary to the purposes for which the corporation was formed. On the contrary the corporation will be in as good a condition to proceed with the objects it was formed to promote after the sale as it was before.”

In other words, it was held that the company being formed to “deal” in mining property

might sell out its holdings with a purpose to invest the avails or such part of it as did not represent profits, in other similar property, likely to undergo the same transmutation. That is the very heart of the problem. The authorities deny the right generally to sell *all* the property of a corporation, because to do so would not be in accordance with any purpose for which the company was created, but would operate to disable it, so that it could not carry out the purpose for which it was created.

Even a right to "deal" in mining property, however, would seem scarcely to authorize a sale of all property including office furniture, bills receivable, etc., etc.

The Alice Company had, as stated, no power to "deal" in mining property. The adventurers who organized it limited its powers within relatively narrow bounds. It was in no sense "a speculating and prospecting company." It had, indeed, "power to buy, sell, lease, hold, own, and operate mines." Undoubtedly the Boston and Montana Company, whose right to dispose of all of its property without the consent of all of its stockholders was denied in the Forrester case, was invested by its articles with like power. The opinion does not disclose and the writer has not access to the record to determine. It would be strange if a mining company should be organized under articles not expressly conferring such power. But it is immaterial whether the power was or was not expressed in so many words in the articles. It existed, nevertheless, a necessary incident of almost any conceivable purpose that may have been expressed in the articles. The power to acquire property

necessary or proper to the conduct of the business for which a corporation is created and the power to sell and dispose of the same exists at the common law.

7 Am. & Eng. Ency., 734.

A like power must have existed in every case that ever announced the doctrine that a corporation cannot sell *all* its property without the consent of all its stockholders.

The rule relied upon by appellants was appealed to in

Keane vs. Johnson, 9 N. J. Eq., 401,

but it was said in opposition that it could not be applied because the charter in that case expressly conferred upon the corporation the power of "purchasing, holding, and *conveying* any lands, tenements, etc." Touching this contention the court said:

"Now it is agreed that the company have by this language the power to convey away all they have the power to purchase and to hold. The argument seems to me more plausible than sound."

And then the chancellor added that the language permitted land to be conveyed—

"when it is necessary or expedient to the objects of the incorporation that it should convey any particular property."

"So that," he declared, "it is only when the objects of the corporation require it that any lawful conveyance can be made."

The Utah Statute.—Reliance is placed, however, upon a statute of the State of Utah enacted in the year 1905, providing that:

“The corporation in its name shall have power to make all contracts necessary and proper to effect its purposes and conduct its authorized business; to sue and be sued; to have a seal, which it may alter at pleasure; to buy, use, mortgage, sell, or otherwise dispose of personal property; to buy, receive, use, sell, mortgage, lease or bond, or otherwise dispose of all such real estate as may be necessary, useful, or desirable for it to own, use, or dispose of for all its purposes. Such corporation shall have the right to disburse out of its profits actually earned and on hand such dividends, from time to time, as the directors may deem prudent. It may make all such by-laws, rules, regulations, not inconsistent with law or with other corporate rights and vested privileges, as may be necessary to carry into effect the object of the association, and such by-laws, rules, and regulations may be made in a general meeting of the stockholders or by the board of directors. And any corporation now existing, or that hereafter may be organized under the laws of this State for the purpose of mining, or the exploration or development of mining property, including lands bearing metal, stones, limestone, oil, petroleum, asphalt, and other hydrocarbons, shall, in addition to the powers above enumerated, have the power to purchase, take on bond or lease, or in exchange, or locate, or otherwise acquire any lands, mines, options, territory, fields, or claims, and to sell, convey, lease, bond, mortgage, dispose of, or otherwise deal in the same to such extent as the board of directors may deem prudent, subject always to the provisions of the articles of incorporation and by-laws; *provided*, that in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors shall not be valid or binding on the

corporation until confirmed by a vote of a majority in amount of the stock outstanding at a meeting of the stockholders duly called to consider such action of the board. When the articles of association provide that the property of the corporation may be sold, mortgaged, or otherwise disposed of by the directors or by the stockholders, sales made in accordance therewith shall be binding on the company."

If the act authorized in terms the transaction in question, the interesting inquiry would be presented, to be followed later, as to whether this law can constitutionally be held to apply so as to affect the relations of stockholders *inter sese* in the case of a corporation organized years before it came into existence. But does it purport to permit an exchange of *all* the property of a mining corporation for capital stock of another?

Reference has been made above to authorities holding that even the most general language in a charter authorizing a corporation to buy and sell lands is to be construed as authorizing not the sale of all the property of a company without which it can do no business, and for the purpose of putting it out of business, but only to sell from time to time such part of its real estate as is not necessary in the conduct of its business, or, perhaps, that can be disposed of with advantage, the proceeds to be invested in other more fit or equally fit. In other words, such a provision authorizes a sale in the course of the regular business of the corporation, not a sale intended to close up the business of the corporation.

See *Kean vs. Johnson, supra*.

In *Forrester vs. B. & M. Co.* the court pointed out that even a general power to buy, sell or exchange property would not authorize an exchange of all property of a corporation for stock of another.

Forrester vs. B. & M. Co. 21 Mont. 562-563.

The statute ought to have a construction in conformity with this principle. It ought to be held to mean that in the case of a mining company, specifically referred to in the act, whose articles do not authorize a sale, etc., the consent of the stockholders as provided therein must be secured; in the case of those whose articles disclose it to have such power, the board of directors may dispose of its property in the regular course of its business without submitting the question to a vote of the stockholders. But quite aside from the question the statute does not authorize the transaction under consideration because it is not a sale, as said by Judge Bourquin, but a swap. A swap for stock of another corporation, which the Alice had no power to take either under the statute. And even if the statute permitted a corporation to hold stock of another corporation, the articles of the Alice did not authorize the acquisition by it of property of that character. Both the law and the charter of the Alice forbid its acquiring stock of the Anaconda.

By the act in question corporations generally are empowered to make all contracts necessary and proper to effect their purposes and conduct their authorized business (not contracts to put them out of business); to sue and be sued; to have a seal, which

they may alter at pleasure, to buy, receive, use, sell, mortgage, lease or bond or otherwise dispose of all such real estate as may be necessary, useful, or desirable for them to own, use, or dispose of for their purposes. And a mining corporation is further given "the power to purchase, take on bond or lease, *or in exchange*, or locate or otherwise acquire any *lands, mines, options, territory, fields or claims*, and to sell, convey, lease, bond, mortgage, dispose of, or otherwise deal in the same to such extent as the board of directors may deem prudent, etc."

It may take *mines, options, territory, fields, or claims* by purchase or exchange. *Stock of another corporation is excluded* by necessary inference. *Expressio unius est exclusio alterius*.

It is elementary law in America that one corporation cannot hold the stock of another unless expressly authorized by statute so to do.

But the Forrester case above referred to goes further and declares that waiving the question of the right of a company to sell or otherwise dispose of all of its property by one transaction, it is a change of corporate habitation that was accomplished, that there was neither a sale nor an exchange in any just or legal sense. The transaction being investigated was identical with that considered in the Forrester case. The court said, and the language is entirely appropriate as applied to the facts of this case:

"A stockholder, we think, may not be compelled to take, in lieu of his stock in a Montana corporation, an equal number of shares in the New York corporation, or the value of those shares; nor can he be compelled to accept payment for his shares in any other

way than that prescribed by the Montana statute on a dissolution of the Montana corporation.”

This comment by the court is sufficient answer to the claim that the transfer was made as a step in the liquidation and dissolution of the company. It accords with views expressed in

Morris *vs.* Elyton, 125 Ala., 263,

which deserves to be studied with care in this connection.

Constitutionality of Utah Statute.

But if the statute could be held to extend to a transaction such as that under investigation, it cannot be, consistently with the constitution, held to apply to corporations created before the act went into effect.

In the act under which the Alice Company was incorporated was a provision to the effect that the legislature might at any time modify or repeal it.

Comp. Laws of Utah, 1876, page 232.

On the admission of the State into the Union in 1895, its constitution reserved to the legislature the right to amend or repeal any law governing the charters of corporations.

The contract implied in a corporate charter has a three-fold aspect:

- (1) It is a contract between the State and the corporation.
- (2) It is a contract between the State and the stockholders.

(3) It is a contract among the stockholders *inter sese*.

Somerville *vs.* St. Louis, 46 Mont., 268.

The court is familiar in a general way with the controversy which has been waged and the conflict in the decisions as to whether the right thus reserved extends to such changes as disturb the relations of the stockholders among themselves, or whether it was intended only for the protection of the public and is applicable only to such provisions as affect the relations between the corporation and the State.

It is conceded that at the time the Alice was incorporated and down to the time of the passage of the act of 1905, any stockholder might prevent a disposition of all the assets of at least a going, prosperous corporation. Such was the law unquestionably, and that law entered into the contract between the incorporators and their successors in interest—that is to say, that at the time the Alice Company was incorporated, the stockholders entered into what amounted to a contract among themselves that the entire property of the company should not be disposed of except for the purposes of liquidation, in the case of its insolvency, without the consent of every stockholder. The question is presented as to whether it is within the power of the legislature thus to modify the contract entered into.

The view contended for by the appellants is upheld powerfully in

3 Clark & Marshall, 631 (*a*), (*b*), (*c*), (*f*).

It will be unnecessary, however, to enter into any

discussion of the merits of the conflicting views touching the extent of the reserved right to amend or repeal, or to inquire which is the better grounded in reason or more amply supported by authority. The question is disposed of, for the purposes of this case, by the direct adjudication of the Supreme Court of Utah in favor of the contention last above referred to, namely, that the subsequent legislation authorized must not affect the nature of the contract of the incorporators *inter sese*.

Garey *vs.* St. Joe M. Co., 91 Pac., 369.

In the opinion in that case will be found an exhaustive discussion of the question and of the reasons impelling the court to the conclusion at which it arrived, and to which it adhered upon a motion for a rehearing.

The opposite view was taken by the Supreme Court of Montana in two cases.

Allen *vs.* Ajax Mining Co., 30 Mont., 490.

Somerville *vs.* St. Louis, 46 Mont., 268.

The Ajax case was affirmed in the Somerville case. The former considered a statute like that of Utah passed in 1905 and here appealed to, authorizing a sale of all the property of a corporation on a vote of two-thirds of the stock. The latter upheld a statute making stock of corporations assessable, there being no law by which an assessment could be levied at the time the organization was effected. It was just such a statute which was considered in Garey *vs.* St. Joe Mining Co.

It is not necessary now to inquire into the sound-

ness of the view expressed or the course of reasoning following in the elaborate opinion of the Utah court. The decision is controlling on this court upon rules thoroughly settled by a long line of decisions of the Supreme Court of the United States. It construes and gives effect to the reservation act of 1874, the principle of which is carried into the Utah constitution. It holds that the general language of that act is to be restricted in its significance so as not to include the authority to enact laws which will impose terms upon the stockholders of a corporation *inter sese* other than those which evidence their contract when they embarked upon the enterprise and organized the corporation. The view was expressed that to give the statute a broader interpretation would make it violative of the Constitution of the United States. When the highest court of a State interprets a statute of that State or a provision of its constitution, or when it declares that a statute is void for conflict with the Constitution, that is, has no existence, its decision becomes binding upon all the Federal courts. It is even held that if the Supreme Court of the United States has given an interpretation to a statute, it will, should a later case upon the statute come before it, conform to a varying construction meanwhile given to it by the State court.

Forsythe *vs.* Hammond, 166 U. S., 506.

Louisiana *vs.* Pillsbury, 105 U. S., 278-294.

When a State statute was restricted in its application because giving it the broad significance to which the language used might properly extend it would

make it unconstitutional, the construction thus given to it by the highest court of the State was held by the Federal court to be conclusive upon the latter.

Chicago vs. Hackett, 228 U. S., 559.

By virtue of the ruling in *Garey vs. St. Joe M. Co.*, the statute of 1905 must be held inoperative as against corporations organized prior to its passage, so far as it attempts to authorize a sale of *all* the property of a corporation against the protest of any stockholder.

Moreover it appears palpably to offend against the provision of the constitution of Utah that, with the exception of general appropriation bills and bills for the codification and general revision of laws, "no bill shall be passed containing more than one subject, which shall be clearly expressed in its title."

Sec. 23, Art. VI, Constitution of Utah.

The act in question appears to be a flagrant case of log-rolling legislation. Apparently some member desired to confer upon the directors and a majority of the stockholders the right to which appeal is made here. Some member wanted some change made in reference to the amendment of articles of incorporation. A third wanted an amendment in relation to the consolidation of corporations. A fourth wanted some legislation in relation to railroad bonds, and a fifth desired validated some acts, presumably void, done by corporations which had attempted to consolidate. They pooled their issues and put through the consolidated measure. All this will appear from the statute as published in the acts of the session of 1905.

In the Revised Statutes of Utah, 1898, a subdivision designated as Title II is devoted to the subject of corporations. Chapter I, under this title, deals with the subject of General Corporations and embraces sections 322, 338, and 340, referred to in the title of the act of 1905, dealing with the subjects, respectively, of the powers of corporations, amendments to articles of incorporation and consolidation of corporations, each respectively preceded by the subheads, "Powers enumerated," "Amendments," "Consolidation."

Chapter II of this title treats of the subject Assessments; III, Bank Corporations and Banks; IV, Building and Loan Associations; V, Insurance Corporations; VI, Loan, Trust and Guaranty Associations, and VII, Railroad Corporations. Section 444, the last of those referred to in the title of the act of 1905, is one of the sections of chapter VII. Besides thus uniting amendments to sections being parts of the chapter on railroad corporations with sections being parts of the chapter on general incorporation, the title gives no kind of intimation that mining corporations are to be invested by the amendment with any powers other or different from those of corporations generally, nor is there any suggestion in the title to the bill, that the right of a stockholder to object to a transfer of all of the property of the corporation guaranteed to him by the then existing law was to be taken away from him. The title simply apprises the citizen that an amendment is to be made to certain sections of the statutes affecting the powers of corporations. That would be understood by the ordinary reader to refer to the powers of corporations

generally. If an amendment was to be made by which mining corporations were to be granted other or different powers from those conferred upon corporations generally, or if, by the act in question, the directors of mining corporations or a majority of the stockholders thereof were to be invested with powers not to be exercised by other corporations, or the directors or stockholders thereof, plainly the statute should have so stated in order to meet the requirements of the constitution.

II. Has the Alice Gold & Silver Mining Company the Power to Hold Stock of the Anaconda Copper Mining Company?

The general rule of the common law is unquestionably against the right of one corporation to hold stock in another, unless expressly authorized by the law, though the authorities are undoubtedly divided on this question. The rule very generally adhered to was declared in Montana in the case of

MacGinniss *vs.* Boston & Montana Mng. Co.,
29 Mont., 459.

In the opinion in that case it is said that Iowa and Maryland hold otherwise, the argument being that the power to hold and dispose of property is inherent in a corporation the same as in an individual, and that no express authorization is necessary. The courts holding the contrary doctrine, however, declare that unlike an individual, a corporation has no powers except those conferred upon it by statute, and that unless the right to hold stock in another corporation is

expressly conferred it is withheld. Such is the doctrine announced by the Supreme Court of the United States.

Cal. Bank *vs.* Kennedy, 167 U. S., 362.

The rule is tersely expressed by NOYES in the following terms:

“SEC. 264. *Necessity for Statutory Authority to Purchase Stock. Rule in United States.*—The character of a corporation is the measure of its powers. It can exercise only such powers as are conferred upon it, either in express terms or by necessary implication, in the law of its creation.

“The purchase of stock in another corporation involves a participation in a new and distinct enterprise. A corporation can make such a purchase only when expressly authorized to do so by statute, or when the power can be implied as incidental to the powers specifically granted.”

Combining the propositions considered above under subheads 1 and 2, the same author says at section 281, as follows:

“Upon principles already considered at length, a corporation has no implied power to transfer its entire property to another corporation in exchange for its shares. The acquisition of stock, in such a manner, is *ultra vires* and an infringement upon the rights of dissenting stockholders.”

In accordance with the principle laid down in the quotation last above made, it was held in the case of
Elyton Land Co. *vs.* Dowdell, 20 So., 981-983,

that even though by its articles a corporation was authorized to “take stock” in other corporations, it

was not authorized thereby to effect its own dissolution by a sale of all its assets, taking the stock "of another company in payment for distribution to the stockholders or any shareholder without the consent and contrary to the preference of the shareholder," and, in the course of the opinion, the court adds: "It may be that a private business corporation may sell out its entire property by and with the consent of less than all its stockholders, for the purposes of paying its debts, or for the purposes of dissolution and settlement; but when this is the purpose, it must be clearly understood, and the terms and conditions of the sale must be within the contractual relation between the corporation and its creditors or shareholders."

In the MacGinniss case, the court found that a Montana mining corporation was not prohibited from acquiring and holding stock in another mining corporation, and that, accordingly, a foreign corporation might hold stock in a Montana corporation. It referred in the course of the opinion to a provision of the statute which authorized the consolidation of mining corporations "in such manner and upon such terms as may be agreed upon by their board of directors," and to another statute, then of recent date, by which corporations were authorized to exchange their property for stock of other corporations. After referring to the consolidation statute, the court said:

"If such corporations may consolidate in any manner and upon any terms without restriction, they may proceed by conveying all of their property to a

corporation organized for that purpose, or by the purchase by one of the companies of stock of the others in whole or in part."

Apparently the court gave no particular consideration to the significance of the word "consolidate" as it appeared in the statute, and we are not prepared to say that such a transaction as it refers to might not be regarded as a consolidation within the meaning of the Montana act. It may be, and frequently is, given so general a significance as to embrace the case of the sale and transfer by one corporation to another of all of the property of the former. In that case neither of the old corporations go out of existence and no new corporation is organized. This is not, however, the significance ordinarily given to the word "consolidate" in these statutes. The distinction between a sale of all corporate assets and a merger of two or more corporations is pointed out in

4 Clark & Marshall, 335.

4 Cook, sec. 897, page 3293.

Helliwell on Stock, 378.

Lee *vs.* Atlantic, 150 Fed., 787.

4 Cook on Corporations, sec. 897, page 3298.

Noyes, 279.

Wm. B. Riker & Son Co. *vs.* U. D. Co., 82 At., 930.

All of these authorities hold that as the term is ordinarily used in statutes it contemplates the passing out of existence of the old corporations and the organization of a new one, and that such a transaction as is here before the court is not to be regarded as a consolidation at all.

It is expressly stated by Cook that the Federal authorities are in conformity with this view, and he quotes from the Supreme Court of the United States to the effect that "a consolidation is not a sale." That the word "consolidation" is used in the Utah statute in its restricted, that is, its ordinary sense, is evident from the provisions of the statute in relation to the consolidation of railroad corporations, appearing at page 217 of the statutes of 1876 and from the provisions in relation to consolidations in the statutes of 1898, as amended by the act of 1905.

The transaction in question can in no manner be justified by the provision of the law of Utah in force at the time the Alice Company was organized permitting a consolidation of companies organized under its provisions and engaged in the same character of business. However the right of one corporation in Montana to hold stock of another can be deduced from its consolidation statute, no such right flows from the Utah statute on the subject of consolidation.

The omission of the legislature of the State of Utah to empower mining corporations to hold stock in other corporations must be considered as a denial of such right. In the year 1905 the legislature of that State invested *irrigation* corporations with the power to hold stock in other companies. Section 57 of an act approved March 9, 1905, reads as follows:

"SEC. 57. *Stock May be Taken in Other Irrigation Companies.*—Any irrigation or reservoir company, incorporated and existing under the laws of this State, may purchase or subscribe for the capital stock of any other similar corporation, which, at the time

of such purchase or subscription, shall be or is about to be incorporated; *provided*, that such purchase or subscription shall be made only when permitted by the original articles of incorporation or by amendment thereto proposed and adopted according to law, and such corporations are hereby permitted and authorized to amend their articles of incorporation so as to authorize such purchase or subscription."

The express grant of the right to irrigation companies clearly indicates that the legislature of Utah understood that without direct authorization irrigation companies would have no such power. It will be noted, likewise, that irrigation companies were not generally clothed with authority to hold stock in other companies. They were not to be permitted to acquire property of that character unless the articles of incorporation expressly declared that they might. The articles of the Alice Company do not authorize it to become the holder of stock in another corporation, and it can engage in no business except that which is authorized by its articles, as has been held by the Supreme Court of Utah in

Seeley *vs.* Ass'n, 75 Pac., 367.

Here, likewise, the general rule is recognized, but it is asserted there are exceptions to the rule, and that the present case comes within the exception.

One exception to the rule is that where a debt is due to a corporation it may accept stock in payment for the debt or as collateral security. In *Bank of California vs. Kennedy*, referred to above, the Supreme Court of the United States recognized this ruling. A national bank is forbidden to take security for any loans it may make on real property, but if it

does make a loan, and afterwards its safety becomes doubtful, or the bank is unable immediately to collect, it may take security upon real estate or it may levy an execution upon real estate and sell the same for the satisfaction of the debt. But such conditions do not exist here, and they afford no warrant whatever for a voluntary exchange of the property of the company for stock in the Anaconda Company, nor do the authorities involving them afford any justification for the attempt on the part of the directors and a majority of the stockholders of this company to transform the Alice Mining Company from a mining corporation into a stockholding company.

It is said likewise in this connection that a corporation is entitled to take stock in another corporation for a temporary purpose. It may take it for the temporary purpose of utilizing it for the liquidation of a debt, as above indicated, but there is no rule supported by any reliable authority to the effect that it may take it for any and every purpose, provided that purpose be a temporary one. If the directors and a majority of the stockholders of the Alice Mining Company concluded to make a stock-jobbing company of the Alice Mining Company, all the stock it acquired would be held for a merely temporary purpose. It would buy stock with a purpose not to hold it as a permanent investment, but in the expectation of selling it as speedily as possible, and yet it will scarcely be contended that the Alice Gold and Silver Mining Company would have any power to either acquire or hold stock for any such temporary purpose. But what is the temporary purpose for which it is said this stock was acquired? It was contended

at the argument in this connection that it was taken as a step in the dissolution of the Alice Company, and with a view to the distribution of its assets among its stockholders, but an examination of the circular letter issued to the stockholders and the minutes of the proceedings of the stockholders' meeting discloses no intimation of even the remotest character of a purpose to effect a dissolution of the company, and it was not until a year after that any suggestion was made to the stockholders that a dissolution was contemplated. On the contrary, the original letter, on the faith of which it is to be presumed the stockholders acted when they authorized the sale, clearly carried an implication that the Anaconda stock was to be held as a permanent investment by the Alice Company, as it rather glowingly set forth the prospects before the Anaconda Company, allowing the inference to be drawn that the Alice Company would thereafter be the recipient of dividends of considerable amount which it would be in a situation to distribute among its stockholders.

The testimony of Mr. Kelley is, of course, quite direct, that the general plan of consolidation, subsequently including the Alice, was to cause the property of all of the companies to be transferred to the Anaconda and then to procure their dissolution. Although it was not so stated explicitly, perhaps, it is to be implied that the Anaconda stock received by each company was to be distributed among its stockholders, as it afterwards was, save that the present proceedings interfered with the distribution among the Alice stockholders. In other words, it never was contemplated for a moment by any one that the

30,000 shares of Anaconda stock should be turned into cash, put up to the highest bidder and sold. No such plan was carried out and it would have been destructive of the whole policy under which the properties were handled to have followed any such course. The Alice was to be dealt with just as was any other subsidiary company. The Amalgamated officers never had any purpose to have the stock received by the Boston & Montana put up for sale at auction with the probability that actual investors would run the price up on them or get the control of the properties out of their hands, or that speculators would enter the contest and compel them to pay an exorbitant price for the outstanding stock. They could not afford to take any such chances and they never intended to take any such. They proposed to divide the Anaconda stock received for the Boston & Montana properties *in kind* among the holders of the B. & M. stock. Holding the control of that stock they would likewise hold control of the shares of Anaconda stock it was to distribute among its stockholders. And so with the Alice. If the purpose was entertained to dissolve the Alice, it was a purpose to dissolve it upon the distribution in kind of its share of Anaconda stock among its stockholders, not upon the distribution among them of the money it should receive upon a sale of the Anaconda stock received for its properties.

It becomes necessary, accordingly, to find some authority that will justify a holding of stock acquired upon the sale of the property of a corporation, not to be turned into cash immediately for liquidation, but to be distributed in kind to the stockholders pre-

paratory to dissolution. It is not claimed even that a stockholder can thus be forced to surrender his stock in one corporation and take in lieu of it stock in another corporation. The transaction is indefensible upon any theory of the law of corporations.

But was the stock acquired as a part of a plan of the Alice Company to convert its property and liquidate? That the managers of the Amalgamated Company may have entertained the general plan may be admitted; that there was acquiescence in this plan on the part of the directors of the Butte Coalition, who appeared never to entertain any contrary purpose, nor on the part of the Alice directors, who were mere dummies, may be true. The mere discussion of such a plan by Mr. Ryan or the announcement of his purpose to carry it out, he being at one and the same time a director of the Amalgamated, the Anaconda, the Butte Coalition and the Alice, would not make out such a purpose by Mr. Ryan *as a director of the Alice*. It is absurd to talk of Allen or Ferry entertaining any purpose at all. No one of the five directors of the Alice was the *bona fide* holder of any stock in it. They all held what stood in their names in trust for the Butte Coalition. The directors of that company may have entertained such a purpose. There is no pretense that the directors of the Alice, while acting as such, ever manifested or declared such a purpose. The nearest we get to it is that there was some discussion as to the power of the board of directors to sell all the property of the company.

Record, pages 858-859.

It is not suggested that this discussion—it had no

necessary connection with dissolution or liquidation—occurred at a board meeting, and it is not even claimed that at any board meeting such an intention was either professed, declared or resolved. It is said that counsel for the Alice participated in the general plan, but the counsel named was a member of a law firm which for years had been the counsel of the Amalgamated Copper Company, the same gentleman who represented the Anaconda Company in the taking of the depositions in this cause in the East.

But let that go. Assume that at a meeting of the board of directors of the Alice Company—directors who had some personal interest in its affairs, not the mere representatives of the Butte Coalition Company, or the instruments of the Amalgamated—it had been resolved to make the transfer, acquire the Anaconda stock, make the distribution and dissolve. The directors of a corporation have no authority to do any of these things. It is not pretended that without the action of the stockholders they had the power even to sell—they sought explicit authority from the meeting of the stockholders. Their purpose to dissolve was equally nugatory unless shared by the stockholders. The latter were not asked for their views. Conceiving them, now, as a body, to have been capable of entertaining any views contrary to those of the Amalgamated managers, it is not improbable, at least not unthinkable, that they would have declined to sell if the proposition were submitted to them coupled with another to dissolve, or that if the two were submitted they would have approved the former and rejected the latter. It is readily conceivable that, reading the circular upon

which their votes were asked in favor of selling, they were led by it to believe that the Anaconda stock would be a most valuable asset in the treasury of the Alice, yielding a revenue constantly and likely to increase in value by reason of the active development of the property it was to transfer with the other undeveloped mining claims to which the circular made reference. Indeed, it is respectfully submitted that the letter, adroitly and skillfully drawn as it was, was calculated to induce just such a belief. This means that at the time the sale was made, the directors of the Alice may have had a purpose to dissolve, rather the minds that wielded the greater organization behind it may have had such a purpose, but the Alice corporation, if one thinks of it as something separate and apart from Mr. Ryan and his associates in the larger corporation, had no such purpose.

Judge Bourquin felt impelled to reach the conclusion that the proposition submitted to and acted upon by the Alice and its stockholders was to take the Anaconda stock as a permanent investment. On that feature of the case he says:

“Now Alice had not capacity to acquire corporate stock save under exceptional circumstances—that disposition of its property was of urgent and immediate necessity, and that no cash purchaser was available or that by trade a substantially larger sum could be realized, or the like—absent here. It is of the contract between corporations and their stockholders that any sale of all corporate property to distribute proceeds to stockholders shall be for money, the ultimate measure of value. A stockholder is not bound to accept anything but money for his equitable share of corporate property nor bound to permit a sale to be made for other chattels or goods to be distributed.

Although Alice directors personally contemplated some time dissolution of Alice and distribution of the Anaconda stock, not finding expression, in contemporaneous board action, it did not deprive the taking of the stock of the quality of a permanent investment."

Record, pages 186-187.

Even if the right to sell all of its property under the circumstances appearing could be justified, the Alice had no power to acquire or hold the stock of the Anaconda, and, accordingly, the sale was void.

III. The Identity Between the Parties Effecting the Purchase and the Parties Accomplishing the Sale.

The deed sought to be annulled was executed by John D. Ryan, president and one of the directors of the Alice Company. He was, at the same time, one of the directors of the Anaconda Copper Mining Company, which purchased and had meanwhile become the President of the Amalgamated. Not only was he a director of the purchasing company, but he was and for a long time had been the "managing director," becoming such, according to the testimony, about the year 1904. To all intents and purposes he was, likewise, the "managing director" of the selling company. The affairs of both companies in the city of Butte fell under his supervision. It is not in evidence that any other officer or director of either company gave any direction with reference to the business affairs of either at the time the transaction occurred resulting in the execution of the deed sought to be set aside.

This is not a case presenting the simple question of a sale from one corporation to another, the two having a common director. It embraces, indeed, such a condition, but that condition is relatively unimportant, and the cases which consider sales of that character are helpful, but they are weak, because of elements uniting with that feature in this case very much more perilous to the validity of the sale under consideration. To illustrate: Mr. Ryan is a member of the board of directors of the Chicago, Milwaukee & St. Paul Railway Company. It is likely to be a heavy purchaser of copper in the near future and may, probably will, buy from the Anaconda, of which he is a director. But it does not appear, and the fact probably is, that he exercises no such dominating influence over its affairs as he does over those of the Amalgamated or its subsidiaries. Neither that company nor the Anaconda appear to own any stock in the railroad company. There is not shown to be any intimate relationship in the management of their business. The manager of the railroad company, even its purchasing agent, could probably exercise his judgment in placing the order without dread of dismissal should the award be made to some copper company other than the Anaconda. I say perhaps he could. If the purchase were considered at a board meeting, it is not unlikely that some of the members, even a majority, might not be the owners of any Amalgamated or Anaconda stock—men who are in a situation to exercise the unbiased business judgment which the immensity of the transaction required. If the sale was made and a court were called upon to pass judgment upon it, the rule of a common

director would be applied. It would be applied in view of a multitude of instances which the history of corporations affords of frauds worked upon stockholders and the public in such sales.

The exposure of the transactions through which the Chicago & Alton was looted gave proof of the wisdom of the rule under which such sales are subjected to careful scrutiny by a court of equity.

It was with reference to such a case—that is a case of common directors, merely—that this court said in
Idaho-Oregon L. & P. Co. *vs.* State Bank, 224
Fed., 39:

“Contracts made by directors who represent opposing interests, while not void *ab initio* are voidable in a proper proceeding taken for that purpose by the corporation, its shareholders or its creditors. 10 Cyc., 791. Richardson *vs.* Green, 33 U. S., 30.”

We do not pause to inquire whether there be any essential difference on the point in question between this court and the Supreme Court of California in a late case,

Sausalito Bay L. Co. *vs.* Sausalito Im. Co.,
136 Pac., 57-59,

in which that court quotes approvingly the following from O'Connor *vs.* Coosa F. Co., 95 Ala., 617; 35 Am. St., 251, which it refers to as the “correct doctrine,” namely:

“If the same persons as directors of two different companies represent both companies in a transaction in which their interests are opposed, such transaction may be avoided by either company, or at the instance of a stockholder in either company, without

regard to the question of advantage or detriment to either company. Both the corporations are armed with the right to repudiate such a transaction, no matter how fair or open it may be shown to be. * * * The general rule is that such dealings are not absolutely void, but are voidable at the election of the respective corporations, or of the stockholders thereof. They become binding if acquiesced in by the corporations and their stockholders."

But when the one corporation actually owns a majority of the stock of the other corporation, so that it is bound and helpless, or it is equally so because the control is exercised even without the ownership of a majority of the stock, justice demands the application of another rule.

The writer is constrained to believe that the apparently irreconcilable differences in the statement of the rule applicable to the case of a sale from one corporation to another having a common director spring very largely from the degree to which control was exercised in each particular case. Cases can be found which, on the one hand, declare such a sale to be absolutely void, and on the other that the fact is a mere circumstance tending possibly to show fraud, but of itself of little consequence.

Authorities are not wanting that hold a transfer from one corporation to another, the two having a common director, as absolutely void. Such is the conclusion that must necessarily be drawn in such cases as

Munson *vs.* Syracuse, 103 N. Y., 58.

Summers *vs.* Glenwood, 86 N. W., 749.

Thomas *vs.* Brownville, 2 Fed., 877.

On a proposition such as this, on which the authorities are in a state of the greatest confusion and in respect to which there is much conflict that is irreconcilable, comparatively little aid can be given the court by reference to individual cases. It is believed that it will be more helpful to refer the court to what is said upon the subject in the modern text-books which have considered it. We quote the following from the second edition of Thompson:

“Contracts between corporations having a common directory are regarded by the courts very much with the same suspicion as contracts between individual directors and their corporations. Some courts have gone to the extent of holding that such contracts are *prima facie* fraudulent and void. But the more general as well as the more reasonable rule is that such contracts are not void but voidable. And the fairness of such contracts must be shown by clear and convincing proof, and it must be made to appear that they are absolutely free from fraud. Contracts between corporations having a common directorate are voidable, although there was a quorum in each board of directors who were not directors in the other.
* * * In England corporations having directors in common are prohibited from contracting, and such contracts are made void by statute, unless they are ratified by a vote of the stockholders. Under such statute it is held that a contract so made could be ratified, although the by-laws prohibited the directors from making contracts in which they were interested. In New Hampshire such contracts are held invalid on the ground that stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussions. Dealings between corporations represented by the same persons as directors may be accepted as binding by each corporation and the stockholders thereof. The rule is that such dealings are

not absolutely void, but rather voidable at the election of either corporation, or of the stockholders thereof; and they become binding if acquiesced in by the corporations. A contract between two corporations with the same directors and principal officers will be presumed fraudulent as between them; but such presumption may be overcome by convincing proof that the transaction was fair."

II Thompson on Corporations, sec. 1242.

And the following from

10 Cyc., 791.

"e. Cannot Act for Corporation and for Opposing Interest.—Contracts made by directors who at the same time represent an opposing interest, generally where the other contracting party is a corporation in which they are also directors, are not void *ab initio*, but are voidable in a proper proceeding taken for that purpose, by the corporation, its shareholders, or its creditors."

After having canvassed the subject of a sale of corporate property made to a director and the principles applicable thereto, the author of the American and English Encyclopedia of Law, says:

"2. Contracts Between Corporations Having Common Directors or Members.—The principles above stated apply not only to the case of a director contracting with his own corporation, but also to that of directors of one corporation contracting with themselves as directors of another corporation."

21 Am. & Eng. Ency. of Law (2d ed.), 899.

Noyes on Intercorporate Relations, says, at section 114, that

"where the directors of the vendor corporation are substantially interested in the vendee corporation,

a sale of corporate assets will be annulled if unfair, and the burden is upon the directors to show its fairness. And if the directors of the vendor corporation are likewise directors of the vendee corporation and thus control the action of both, the sale is voidable and will be set aside at the instance of a stockholder, regardless of its fairness."

It will be observed that when, in addition to the fact that the buying and selling corporation have a common director, it appears that the owners of a majority of the stock of one corporation acting through the directors thereof, or otherwise, are interested in the stock of the other corporation, or exercise a controlling influence over its affairs, the transaction becomes even more vulnerable. This branch of the subject is considered by Thompson in the section succeeding the one last above referred to. The discussion is introduced by the following:

"§1243. *Directors Contracting with Another Corporation in Which They Own Stock.*—Contracts of consolidation, lease or sale are frequently entered into between corporations where the directors of the one are largely interested in the stock of the other; or where one corporation owns a majority of the stock of the other contracting corporation; or where the stockholders of the two corporations are practically the same. Such contracts are governed by the same rules, substantially, as those where directors deal with themselves, or with the corporation. They are not necessarily void, but if there is actual fraud or if any undue advantage is taken, or the contract is unfair, the courts will give relief at the instance of the injured party. Thus, where a majority of the directors were interested in a contract adversely to the stockholders of the other contracting corporation, the contract was held illegal, and the fact that the

directors made the contract openly did not validate it. So, minority stockholders may have a lease canceled which is made by officers and owners of a majority of the stock to another corporation."

The court will observe that a case of that character is governed by the same rules as are applicable where the directors deal with themselves personally—that is to say, where they buy from or sell to a corporation of which they are directors, not for another corporation, but for themselves personally. On principle, it is impossible to make any distinction between the case of a director of a corporation buying its property on his own account or buying it as the agent of an individual, or buying it as the director of a corporation, either as agent for some one else or as the director of a corporation. He is bound by his duty under the law to act with the same careful regard for the interest represented by him as he would were he acting for himself. It is conceded, of course, that authorities can be found asserting the proposition that a sale is not voidable when made by one corporation to another corporation having a common director, no other feature being involved. The case of *Smith vs. Ferries* so holds and other California cases asserting the same doctrine, but it is impossible to reconcile the California cases upon this and related subjects. Authority can be found in the California reports for practically every gradation in view on this subject, from the idea that the transaction is absolutely void to the idea contended for by the defendant, namely, that the fact is a mere circumstance, and that the burden is upon the party attacking the transfer to show that it is in fact fraudulent.

It will not be necessary to go into the collateral questions involving the principles now being considered to show the conflicting authorities coming from California. The case of

San Diego *vs.* San Diego, 44 Cal., 106,

appears to be directly opposed on the very question being considered to the holding in *Smith vs. Ferries*. That action was brought to have declared void a deed executed by the trustees of the city of San Diego to a corporation, of which one of the trustees was a stockholder and director. The court, having referred to the general principle "that no man can faithfully serve two masters whose interests are or may be in conflict," and the application of it to the case of a sale by one to a corporation of which he is a director, continued:

"But it is claimed by the respondent that the rule does not apply in this case, because, the conveyance being to the railroad company, Sherman as a stockholder had only a remote or contingent interest in the land conveyed.

"While it is true that a corporation holds the legal title of the corporate property, it is equally true that it holds it for the benefit of its stockholders. In them is the beneficial interest. If it makes, it is their gain; and if it loses, they bear the loss. At common law, though not parties to the record, they could not be witnesses for the corporation, for in all matters in which it was concerned they were considered to have a direct, certain and vested interest.

1 Greenleaf on Ev., sec. 333.

"Men may, and often do, feel as deep a concern for the success of a corporation in which they are interested as for their own private affairs. To hold, therefore, that one intrusted with property in a

fiduciary capacity may rightfully bargain in reference to it with a corporation in which he holds stock, would be to ignore all the evils which the rule in question was intended to prevent.

“But Sherman was more than a stockholder; he was a director of the corporation, also. As such he sustained the relation of a trustee to the stockholders, and it was his duty to use his best efforts to promote their and the corporation’s interests.”

That the same minds which in this case directed the submission of the proposition to sell directed the acceptance of the same by the stockholders’ meeting is incontrovertible. D. Gay Stivers, one of the Butte attorneys of the Anaconda Company, went from there to Salt Lake to attend the meeting. He, Mr. Ferry, one of the members of the law firm of Richards, Richards & Ferry, attorneys for the Alice, Mr. F. S. Richards, a member of the firm, and Willard Hamer, a clerk in their office, cast every vote recorded in favor of the resolution of sale. It is obvious that these gentlemen had instructions concerning what was expected at the meeting. None were conveyed by letter to the gentlemen residing at Salt Lake, and it is reasonable to assume, as Mr. Allen assumes, that Captain Stivers, one of the Anaconda attorneys, had oral instructions from Mr. Kelley, its chief counsel.

Various letters transmitting proxies to Ferry and telegrams concerning same give no directions as to how he is to vote them.

Record, pages 657-665.

Ferry reported to Allen that the business of the

meeting had been transacted "according to the plan outlined."

Record, page 656.

Nor is it possible to obscure the guiding hand, the controlling influence of the Amalgamated officers, in this transaction behind the ownership of the majority of the stock of the Alice by the Butte Coalition. It is unnecessary to review the facts disclosed by the evidence of the identity of the governing minds whose will was reflected in the acts of this company and those the majority of whose stock was owned by the Amalgamated.

When the plan was formed to consolidate all the subsidiary companies of that combination, the Butte Coalition and the Red Metal, whose stock the former owned, were included as a matter of course. In the execution of the plan it was found necessary to embrace the Alice because its stock was held by the Butte Coalition, but the latter was regarded in the original plan exactly as was the Anaconda or the Boston & Montana or the Parrot. There never was any doubt, apparently, upon the part of those who conceived or carried out the plan to unite the title to all the properties of these companies in the Anaconda, that the Red Metal or the Butte Coalition ought not to be included or that there lurked here any special danger to the success of the plan. That plan did not contemplate the acquisition of new properties not theretofore controlled by the Amalgamated; it embraced only those which could be spoken of as Amalgamated properties—in which the influence of that organization was dominant. Furthermore, the

circumstances attending the birth of the Red Metal and the Butte Coalition forbid us to believe that it was not controlled by Amalgamated influences in its infancy, and every fact developed tends to confirm the presumption of the continuance of the relationship which came into existence on its organization.

The Red Metal took the Heinze properties on the settlement of the bitter, protracted, and expensive litigation which had been waged. All the negotiations for that settlement were carried on by Ryan, on the part of the Amalgamated. He and Cole were at the time associated in many business enterprises, chiefly mining. Cole took an assignment of all the claims of Heinze against the Amalgamated and released them all in consideration of the release by the Amalgamated of all claims against Heinze and his companies. It may be true that the public being informed that a settlement had been or was to be effected and that the Butte Coalition was to hold the stock of the Red Metal to whom the Heinze properties were to be transferred, eagerly subscribed for the stock, so that the Amalgamated was not even called upon to put up any money to acquire the properties. But the stock was subscribed for thus eagerly only because it was and must have been understood that the company was to be another subsidiary, as it was. The stock must have been underwritten, in effect, if not in form, by the Amalgamated. It was agreed that Heinze was to get \$10,500,000. If the amount had not been forthcoming from subscriptions for Butte Coalition, the Amalgamated was bound to take enough to make up that figure. It is of no consequence that it actually became the owner eventually of but 50,000 of the

1,000,000 shares. The company was organized by its officers and others in most friendly relations with them. It could not afford to have it otherwise. Of what avail would it be to have reached a settlement if the properties should pass to a company in which its voice was not potent? No one ever charged the gentlemen who have directed the business affairs of the Amalgamated with a want of ordinary business sagacity. It might as well have left the properties with the Heinze companies as to have procured them to be transferred to a company in which it had no controlling voice. Its officers became stockholders in the Butte Coalition, Mr. Ryan, himself, Mr. Rogers, Mr. Rockefeller, and Mr. Addicks.

Record, page 427.

In fact the 50,000 shares which the Amalgamated acquired came from the generous store of Mr. Rogers, who, because of some consideration dating back to the time of the organization of the company, when it had an "option" to take some Butte Coalition stock, let the company have a bagatelle of a million's worth, practically, at \$16.50, when it was selling at \$31 and \$32. This "option," which would have been a most interesting contribution to the history of these transactions, could not be produced.

Besides the officers of the Amalgamated many of its employees took stock in the Butte Coalition. It was not without reason that the former said in its annual report for 1906 that parties "friendly" to the Amalgamated had acquired the Heinze properties,

Record, page 590;

that they had been transferred to the Red Metal Company, whose stock was held by the Butte Coalition "controlled by the same *friendly* parties" (*Id.*). So friendly were they that despite the furious controversies of the past the same attorneys thereafter handled the business of the Red Metal Company and all the other Amalgamated companies. With the stock owned by the principal officers of the Amalgamated, its own holdings and such as it could control in consequence of proxies sent on blanks which went to every stockholder with notice of a meeting, there never was a time when it did not control the Butte Coalition. Control through proxies is now well understood. The officers of successfully conducted mutual life insurance companies perpetuate themselves in office in that way. The American Tobacco Company actually owned but a very small percentage of the stock of many of its subsidiary corporations, and the same conditions existed in the case of a number of those controlled by the Standard Oil. A list is given in each case with the opinion of the Supreme Court.

It is asserted in

Hyams vs. Calumet & Hecla, 221 Fed., 513-541,

that control by proxies of one company selling to another, presents a case, so far as the validity of the sale is concerned, that differs in no essential particular from control by stock ownership. The case last referred to is interesting. It involves a consolidation of the Michigan copper companies. Liberal Michigan statutes touching the ownership of stock in one

corporation by another saved the consolidation in its initial stages.

Bigelow *vs.* Calumet & Hecla, 155 Fed., 869;
S. C. 167 Fed., 704.

But when the plan to arrest which the suit, resulting as in the opinions cited, was begun, was carried out and its operation observed, the court came to the conclusion, perhaps because there is less tolerance than formerly of such combinations, that it is illegal.

The consolidation was condemned because, as the court expressed it, "The Calumet & Hecla was, in the transaction in question, both buyer and seller."

Hyams *vs.* Calumet & Hecla, 221 Fed., 542.

The rights of the parties to this litigation are to be determined just as though the Amalgamated or the Anaconda owned a majority of the stock of the Alice instead of such ownership being in the Butte Coalition. No one can doubt that the difficulties in the way of the carrying out of the general plan of consolidation were heightened in no material degree, because either of the two companies first named did not own a majority of the Alice stock. The real power which put through the transfer was the same as though one of them was the majority holder of the Alice stock.

But whatever view may be taken of the relationship between the Alice and the Amalgamated or the Anaconda, the connection of Mr. Ryan with both of the corporations, the purchaser and the seller, requires that the sale must be characterized by *uberima fides* or it cannot be sustained.

(a.) It must appear that it was wise to sell and that some condition had arisen such as would prompt a sale had the property been owned by a company under no compulsion to sell, nor subject to the dominating influence of the buyer.

(b.) It must appear that all information in the possession of the purchaser affecting the value of the property was given to the vendor.

(c.) It must appear that the consideration was altogether adequate.

(a.) Mr. Corry and Dr. Weed both declare, what is obvious, that it was unwise on the part of the Alice to sell—if one may speak of the Alice as having sold.

It is of no consequence whatever that it should appear that a piece of mining property was sold for the price it would bring in the market; a preliminary question is to be determined, and that is the necessity to make a sale at all. It is a perfectly well-known fact that mining property, valuable only because of ore which may be found within it at great depth, is exceedingly unsalable property, at any figure approaching its real value. Few people buy property of that character in the expectation of selling it again. Those who acquire an interest in it acquire it ordinarily in the expectation that some arrangement will be made for the operation of the property and the extraction of the values within it and they expect in that way to realize many times the amount that could be realized for it upon a sale for cash. Now what reason was there that ought to impel the stockholders of

the Alice Gold & Silver Mining Company to sell their property to the Anaconda Copper Mining Company? It is true the property had not been profitably worked for a number of years, but it is likewise true, and it is idle to attempt to conceal the fact, that it lies within what has been considered, until very recent years, exclusively a silver district. It had ceased to be profitable to work it as a silver mine. Some effort had been made to determine whether the zinc ores could not be mined at a profit. The result of the tests is before the court in a very general kind of way. But let it be assumed that, in the present state of the metallurgical art, the ores were shown to be too refractory for successful treatment. Progress along these lines has not reached its limit, however, and it is a mere matter of time when these ores will be immensely valuable. And it is equally idle to attempt to obscure or conceal the fact that the copper producing area of the Butte camp is yearly being extended into and beyond the region of the properties of the Alice Company. Experts of the highest character declared it altogether improbable, not to say impossible, that copper should be found in the properties of the Butte-Superior at the eastern extremity of the Rainbow lode which traverses these properties. It is producing copper in very considerable quantities today, and the corporation is operating most successfully. Between them and the properties in question lie Senator Clark's Elm Orlu and Poser. The former, at least, produces copper of the very highest character. The same Rainbow lode which gives value to the claims last named traverses the Alice properties itself, and is cut by the Jessie vein, one of the

enormous producers of the Butte camp. Its productive character and capacity have been demonstrated only within recent years, and in the last few years the Badger State has developed into one of the phenomenal producers of the camp.

Why should this property be sold to the Anaconda Company now? Certainly within the last four years, in view of the developments referred to, its prospects as a producer of copper are no less alluring than they have been ten years and they are unquestionably more promising now than they have been at any time since the Butte Coalition Company acquired a majority of the stock of the company. The Anaconda Copper Mining Company and its engineers certainly anticipate that this property is going to return them the price they paid for it, or they never would have paid it. No reason is suggested why they should have it, why they should want it, except that they expect to realize at least what they paid for it. Now why was the sale of the property made, considering the interests of the Alice stockholders? Was there any clamoring for a sale of the property on the part of any of them outside of the interests associated with the Amalgamated Copper Company, which, apparently, desired the property transferred to the Anaconda Mining Company?

But if, upon a consideration of all of the circumstances and conditions in which the property seemed to be placed, an independant owner of the property would feel that he ought to make a sale of it, what would he do? He would unquestionably employ some high class, competent mining engineer, whom he

would fully assure himself beforehand had no relations whatever with the Anaconda Copper Mining Company, or any of its associated companies that would in any manner influence or bias his judgment. He would procure him to make an examination of all of the conditions. He would ask him to take into consideration all he could learn concerning the extension of the copper producing district into the neighborhood of the claims and the prospects, if any there were, arising from the recent production of copper, both from the Jessie vein and the Rainbow lode, and he would take the advice of such an engineer as to the fairness of the price offered by the Anaconda Copper Mining Company. Then any ordinarily prudent and sagacious owner of such a piece of property would, as a matter of course, make the most diligent effort to find some other party who might desire to purchase the property, with a view to determining whether better terms could not be obtained. The testimony in this case is that practically any property in that region could have been "floated," as the expression is, in what are spoken of as the "boom times" from 1904 to 1907. Those times will come again if they are not now here. Those were boom times, because copper was commanding from twenty to twenty-five cents per pound. With the extraordinary prices now prevailing, there should be no difficulty whatever in finding some one who would be glad to take the property on the usual bonding terms, agreeing to expend large sums of money in the exploitation of the property. It is not in evidence that the stockholders of this company were ever asked even to give a bond on the prop-

erty, even in the boom times, with a view to the disposition of the same to their advantage. The stock of the company during that time was selling on the open market for from eight to nine dollars per share. The company had accumulated an indebtedness of \$34,000 after a period of practical idleness for twelve or thirteen years, but in view of the vast value which the property is conceded to have—upwards of a million of dollars—that must be regarded as a mere trifle. It could have been easily adjusted. In fact there is no pretense that the Butte Coalition Company was demanding satisfaction of the indebtedness due it, or that it was not perfectly willing to carry the obligation upon the ample security of the properties of the company. There was no justification for the sale. It was made because, in the pursuit of the purposes for which it was organized, the Amalgamated Copper Company wanted it. No effort was made to find another purchaser, because that would interfere with its purposes.

Again, if the price paid, practically a cash price, was adequate, as a cash price, it is to be borne in mind that mining property ordinarily brings so little on a cash sale that it is disposed of, as a rule, under lease and bond. In all probability the stockholders of the Alice, if it could be conceived that they were at liberty to act freely in accordance with an untrammelled judgment as to what was their best interest, as such, would have preferred to contract in the usual way for the sale of the property at a figure considerably in advance of what it would fairly bring for cash.

The sale was not moved by any consideration of

what was for the best interests of the stockholders of the Alice. It came about because the Amalgamated wanted the property—wanted to have the title in the Anaconda. It fixed a price on the property and the regular procedure followed in the case of all of its subsidiaries was pursued.

b. While in cases of a purchase by one corporation of another having a common director the authorities lay special stress upon the necessity of a full disclosure, it is obvious that, under the conditions that obtained; the result would have been no different, however complete had been the exposition of the facts touching the value and prospects of the property of which Mr. Ryan and the purchasing companies had knowledge. They had the votes to put the plan through, and there was no one to whom the information could be given save to a helpless minority. It was impossible to lay the truth before any stockholders of the Alice so as to inform their judgment. The condition emphasizes the impossibility of upholding this sale as against the dissenting stockholders. However, the obligation rests upon a purchaser situated as is the Anaconda or the Amalgamated to make full disclosure of all facts of which it has knowledge likely to affect the value of the property. Can any one believe that the Alice stockholders were as well informed or could be as well informed concerning the property and the conditions which affected its value as was Mr. Ryan, and through him the companies, in the direction of whose activities he was so potent a factor, if, indeed, he did not absolutely direct them? He had an opportunity to know, as perhaps

no other man knew, about the entire Butte field. It is idle to assert that the value of the Alice property was not vitally affected by the success or the want of success which attended the explorations and operations in the Badger State. Ryan knew in detail about them. The Alice stockholders, save those in his confidence, could only guess at what was going on, and, of course, had no means of knowing of the showing that was followed by a production of 1,310,431 pounds of copper in 1910, 6,079,005 in 1911, 10,135,197 in 1912, with 80,149 ounces of silver in 1910, 411,367 in 1911, and 687,308 in 1912.

In 1911 the Amalgamated was able to say in its annual report that "There is a general opinion among those familiar with this property and its development that it is destined to become one of the great mines of the district." In 1912 it reported "very gratifying results" from development work done on the 1100, 1300, 1400, 1600, and 1800 levels. The results were indeed so gratifying that the stockholders were advised that during 1913 it was proposed to sink a shaft on the Moose to a depth of 1800 feet "to prospect the veins at greater depth" than they had been tried out by the old shallow workings on that claim, which is a very small one abutting the Alice property.

Despite the plain purpose indicated in the report to prospect the veins in the neighborhood of the shaft so to be sunk, an effort was made at the trial to impress upon the court the view that it was being sunk primarily for ventilation. The report refers to the fact that it will be convenient in connection with the venti-

lation of the Badger State, but the primary purpose is not to be doubted.

The vast promise held out by the great Jessie vein so far to the northwest was preserved a secret from the dissenting Alice stockholders.

The Amalgamated people knew practically as much about the developments in the Butte Superior and Senator Clark's properties as of their own. The Alice stockholders were not on the same footing at all as to information relating to the value of the properties in question. The Amalgamated sent out Herman Keller, Frank Klepetko and Professor Kemp of Columbia University to value the properties going into the consolidation, and though they were sent for that express purpose the Alice stockholders were not apprised as to any judgment these gentlemen expressed concerning the property. The court is told that Professor Kemp made a trip to Butte to examine these properties to aid in placing a valuation upon them so that the proportion of Anaconda stock each received should be ratable and the total just. There is no report from him or his associates available—at least none touching the Alice.

c. Value.—A prominence has been given to the subject of value in the consideration that has been accorded to this case in the district court quite disproportionate to its importance. If the conclusion should be reached that the majority stockholders had the power to dispose of all the property of the Alice in bulk and that they had the right to take Anaconda stock in exchange, and that either there is no offense against the Sherman act in the transaction, or that

minority stockholders cannot be heard to complain on that score, and that the sale is not voidable at the election of any of them because of the control which the Anaconda, the buyer, exercised over the Alice, the seller, and of the other circumstances attending it, including the want of any showing whatever as to why, considering the interests of the Alice stockholders, any sale at all should be made, but is voidable only for inadequacy of the consideration, the question of value becomes one of first importance. It was, perhaps, magnified until the other important questions of law and fact presented by the record were lost sight of.

It is unnecessary to review at length the testimony on value. The burden is on the appellants, as both of the judges called upon to pass upon the evidence held, to show that the price paid was all the property was worth.

In his opinion herein Judge Hunt says:

“It seems clear that considering all the interrelated associations of the corporations heretofore referred to and of the directorships of Mr. Ryan in the several companies, minority shareholders have a right to call upon the courts to require the purchasing company through those of its directors who were also interested in the selling company, to disclose everything which they knew concerning the value of the Alice, the sources of such knowledge, the reasons for the sale, and the fairness thereof. Thus it devolves upon Mr. Ryan to show that all knowledge which as a director of the Anaconda he obtained concerning the Alice properties was given to the directors and shareholders of the Alice Company.”

Record, pages 173-174.

Judge Bourquin said:

“An arbitrary price is *prima facie* unreasonable, and, when assailed as unfair under circumstances like those involved, who defends it as reasonable must prove it.

“Because of common directors, the learned judge who granted the injunction held the burden was on defendants to clearly demonstrate the sale was fair, and the case was tried on that theory. This burden has not been sustained. It is not clear the price paid was substantially adequate, and so the court finds it was not.

“It is impossible to reconcile the cases upon the law of common directors.

“See

Cooke, Corporations, § 658 *et seq.*

Thompson, Corporations, §§ 1242, 1243.

Thomas *vs.* Ry. Co., 109 U. S., 522.

Leavenworth *vs.* Ry. Co., 134 U. S., 689.

“The rule is a good one and general that wherever fiduciary relations exist and in discharge of duty there is conflict of interest, if the transaction is not void, as it often is, it is open to impeachment by the beneficiary, will be closely scrutinized by the court, and if the trustee does not make manifest its fairness, it may be set aside or other relief granted. Corporate transactions like this at bar ought to be subject to this rule. That the common directors were not a majority of either board is a difference in degree, but not in principle. They may have dominated the board. In both cases is divided duty, conflicting interest, possible impaired judgment of unknown effect, difficulty of proof and danger to stockholders.”

Record, pages 183-184.

It is clear that those who controlled the Anaconda wanted the property, and that they fixed the price that was to be paid for it. It is not in accordance with the experience of mankind to find full value

paid under such conditions. Who says the price paid was adequate? The writer entertains a very high regard for Mr. Gillie and the other employees of the defendants whose testimony bore more or less directly on the question of value, but might not the court reasonably expect that some one other than a servant of the Anaconda Company would be called on that important issue? The court cannot fail to be impressed with the fact that neither Mr. Goodale nor Mr. Sales was asked his opinion as to the value of the property. Even Mr. Gillie did not venture an opinion as to its market value, and Mr. Ryan simply declares that he thought "it was a very good trade" for the Alice stockholders.

Record, page 400.

Has the testimony of Mr. Corry and of Dr. Weed, who fix the value of the property at \$3,000,000, been overcome? That enormous values are bound up in the zinc ores known to be in the mines is indisputable. The metallurgical problem is a difficult one, but not baffling when one reflects on the time, money and scientific research spent by the Butte Superior and by Senator Clark to develop an economical method, each for treating the ores from their properties, respectively. It must be admitted that the Ryan interests never tried to do anything with the Alice ores. It does not appear that they ever spent a dollar to test them out.

It was a cautiously framed question that was put to Mr. Bruce to develop the testimony that there is not at the present time any known process by which the Alice ore can be profitably worked for zinc. But

Mr. Bruce tells that in 1906 there was no process known by which the Butte Superior ores could be worked, and that there has been great development since that time in the treatment of zinc ores. He expresses no despair at all about the future of the Alice ores.

It appears that a number of new processes have recently been put in operation and it seems likely that in view of the alluring chances held out in the abundance of refractory ores, the metallurgists of the world will be wrestling with the problem of their reduction.

Moreover, it would be surprising if some of the rich copper veins coming from the southeast, shown to extend into the very region of the Alice properties, did not penetrate them. The Edith May has not been a bad second to the Jessie as a producer. The testimony above adverted to shows that the latter was barren for a long distance on the 1200 after it entered the Badger State, and yet showed wonderful richness in the lower levels. It is in evidence that the northwest series is capricious at best in character, both on the strike and on the dip. There is no reason to despair of finding copper ore in the Rainbow lode at depth. That the sources of that metal were opened by it is shown by the rich ores yielded by the Elm Orlu. More or less is encountered in the Butte Superior.

IV. *The Federal Statute.*

The Sherman act provides:

"SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

"Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, or, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The law was aimed at the consolidation of business organizations, as a result of which a whole flood of public evils ensued, prominent among which was the suppression of competition and the ultimate establishment of a monopoly more or less complete. It will be noticed that section 1 denounces combinations in restraint of trade whether a monopoly is established or not; that section 2 condemns monopolies accomplished or attempted, whether there is a combination or not. It recognizes that a single individual may organize a monopoly, as if one should at-

tempt in these times to "corner" all the grain of the country. Section 1 is aimed at combinations, the purpose of which is the absorption of rival businesses which would otherwise compete with each other, or that has for its object any other interruption of the free course of trade as it has been pursued. It was enacted to suppress the "trusts" and has come to be popularly known as the Anti-Trust Law. In his work on Concentration and Control, President Van Hise refers to the pooling agreements of the eighties and of the causes which led to their abandonment. He then (page 69 *et seq.*) traces the various steps in the process of consolidation through the series of trusts, holding companies and complete merger. The discussion is so pertinent to the present inquiry that, lest the book may not be available to the court, his comments are inserted here.

"(3.) *Trusts*.—Since the pool was a failure, in order to attain the objects striven for by it, the trust was devised. Under the trust, each unit of the combination transferred its stock to trustees. Thus the entire stock of the constituent companies was held by a group of trustees who had complete authority over the business of all the companies entering into the trust. An establishment or company retained its own officers and conducted its business, but under the direction of the trustees, as to line of product, amount of output, and price. The trust was able to prevent overbuilding and overproduction, to prevent competition in price between its units, to apportion business, to consolidate buying and selling, and thus gave all the advantages of unity of organization, as described, pp. 8-20, due to concentration of industry. Well-known types of this organization were the Standard Oil trust, the sugar trust, the cotton-seed

oil trust, the whiskey trust. The great period of the trust was from 1888 to 1897.

"If the pool was a partnership of corporations, it was even more clear that the board of trustees controlling the business of a number of corporations through their trust certificates was such a partnership. In consequence of this, in the late eighties trusts were declared to be illegal, and this led in the early nineties to the next stage of combination.

"(4.) *Holding Corporations.*—Under the trust each of the constituent companies was an independent legal entity. The stock was simply placed in the hands of the trustee for management. In the holding corporation, the stock is transferred to the holding concern, so that this corporation actually owns the stock of the constituent companies. So far as management and operation are concerned, the situation is precisely the same as under the trust, and the advantages the same, only the constituent companies are subsidiary companies instead of nominally independent. The subsidiary company maintains its officers, carries on its business, and competes so far as efficiency is concerned with the other companies of the combination; but as to nature and quantity of output and price, the policy is completely controlled by the corporation of which it is a constituent member. The era of the holding corporation began in the nineties, and has extended through that decade and the first decade of the twentieth century. Great examples are the Standard Oil Company and the United States Steel Corporation.

"While some of the holding corporations have remained merely managing companies, others of them, and some of the more important, have also become manufacturing companies. In these instances some plants are under the direct management of the directors of the corporation, while other parts of the business are run by subsidiary companies. This stage of development is intermediate between the strictly holding corporation and the merger, next to be spoken of.

“Under the common law the stock of one corporation could not be held by another; therefore the holding corporation was declared to be invalid. This situation was met by enactment of corporation laws under which it was valid for a corporation to hold stock of other corporations. The first of the States to reverse the common-law principle was New Jersey. She has been followed by several others, notably among which are Delaware, West Virginia, and Maine. The liberal, not to say lax, corporation laws of these States have led to the holding corporations being organized under their laws, and mainly under the laws of New Jersey and Delaware. According to Frederick W. Kelsey, the State of New Jersey profits to the extent of over \$3,000,000 per annum because of its pioneer position in passing liberal corporation laws.

“However, the corporations which are in whole or in part holding companies, organized under the laws of these States, are now being attacked in the United States Court. In 1911 orders were given for the dissolution of the Standard Oil and the American Tobacco companies, the first of which was strictly a holding company and the second of which was both a manufacturing and holding company. (See pp. 181-187.) Many other holding corporations are now attacked by the Attorney General of the United States and must fight for their existence.

“The holding corporation began in 1897, but the great consolidations did not begin until in 1899, since which time the holding corporation has been the dominant form of consolidation.

“(5.) *Complete Merger*.—This is the final stage in concentration of management. The stock of the constituent companies of the combination is actually bought in and cancelled, the only stock being that of the master company. If, for instance, the different companies of the United States Steel Corporation—the Federal Steel, the Carnegie Steel, and others,—cease to exist by their stock being cancelled and stock of the Steel Corporation be the only existing issue,

we should have the final stage of corporation management for this gigantic company.

"Since the recent decisions of the United States Supreme Court (see pp. 190-191), which seem to indicate that holding companies will be in a stronger position if they are actually manufacturing companies, it is easy to predict that the great consolidations, now forming, so far as practicable will become unified corporations. The merger began to become important about 1904, and since that time its growth has steadily continued, although, as already pointed out, the holding company is still the dominant form of concentration.

"Just as the pool, the trust, and the holding corporation have been successively attacked in the courts, there can be little doubt that the great merger will also there be attacked. Indeed, for intrastate commerce such attack has already been begun. For instance, the Diamond Match Company which bought outright the properties of competing concerns engaged in the manufacture of matches, was declared to be an illegal monopoly in the State of Michigan. Similar attack is likely to follow for interstate commerce under the Sherman act."

The Amalgamated Copper Company did not come into existence until the "trust," strictly so-called, had gone out of fashion, under the condemnation of the courts. It typifies the holding company, but has deemed it wise to get the title to all the properties of its constituent companies in Montana in one company, the Anaconda.

One of the appellants testified to a conversation had with Mr. Kelley, the general counsel of the Amalgamated, while the work of consolidation was going on, in which the latter said that the Federal Government was opposed to holding companies. Though

Mr. Kelley testified later, he did not notice this item of testimony.

The Amalgamated started off master of more productive copper properties than were ever before brought under one control. Assimilating the Anaconda, the Washoe, the Parrot and the Colorado on its organization in 1899, and at once acquiring a huge block of Boston & Montana, it openly took over the last-named great company and the Butte & Boston in 1901, an eighty-million-dollar purchase. In 1906, the Heinze properties were absorbed, and in 1910 the Clark mines, and the rich area belonging to the Alice, since which time it has been without a rival worthy of the name in the Butte field.

We are not permitted to imagine that the firm of Kidder, Peabody & Co., bankers and brokers of Boston, just happened to have \$80,000,000 worth of these stocks in their safe, any more than that Mr. William S. Bogart just happened to have about his person or in his strong box the fine assortment of stocks acquired by the Amalgamated when it began business, and for which it paid \$75,000,000. These people simply held the stock for the projectors of the company, who, in what seemed to them the appropriate and propitious season, caused it to be turned over to the company. It implies, as every one conversant with business transactions of the magnitude of these will recognize, a campaign to accumulate by the projectors through their agents and brokers the huge blocks thus formally purchased by the company.

Doubtless the Boston stocks had been held for some time previous to May, 1901, by the parties who were

ordering the affairs of the Amalgamated. This is obvious from the recital of documents in the record. It appears therefrom that Mr. Rogers was a Boston & Montana stockholder, that some litigation in New Jersey had intercepted an effort which had been in progress for some time to acquire these stocks, and turn them over to the Amalgamated.

There is only one conclusion to be drawn from the testimony. The Amalgamated actually did formally acquire within two years of its organization all, or the majority of the stock of six great, prosperous, competing copper companies of the Butte camp, including the largest producers in the world, the group putting out about 90 per cent of its copper yield. It is reasonable to assume that it was organized for the purpose of thus acquiring and holding those stocks. Its subsequent acquisition of the Heinze properties, the Clark properties, and the Alice properties is reasonably to be assigned to the purpose entertained by its projectors at its birth. But whether there was any such purpose or not, the combination was formed, and various corporations were absorbed and consolidated.

It is unnecessary to prove that any monopoly was established, or that it was the purpose of the projectors to monopolize the copper production of the country. A consolidation of competing companies producing and selling in the markets of the world a very considerable part of the copper which found its way therein, was effected, necessarily eliminating competition between them. The organization was not the result of the ordinary growth and expansion of a business. If under Mr. Daly's efficient manage-

ment the Anaconda Company had accumulated a surplus which it desired to invest, or its credit was good and it was deemed good business to extend its holdings, it might legitimately have gone out and bought the Colorado properties, or those of the Parrot or of the Butte and Boston, or possibly of the Boston & Montana, though such a purchase would give rise immediately to a suspicion that the purchase was made to get rid of a damaging, if not disastrous, competition. If he had accumulated them all at one time, or practically at one time, the conclusion would be well-nigh irresistible that it was a consolidation to eliminate competition, or to monopolize or dominate the market. But Mr. Rogers is introduced into the project that was carried out, with Mr. Rockefeller, strangers in the copper world. With Mr. Daly they organize a holding company, which secures control of these corporations, holds a majority of their stocks, or sufficient to dominate them. These strangers might have thought copper stocks excellent investments. They might have thought it wise, taking no further thought than that good dividends would be returned and the market price advance, to buy some of these stocks. But why get control of each of the companies? And why organize another company to hold the stocks thus acquired? Mr. Burrage, whose testimony discloses, but only very feebly discloses, the effort he made, somewhat resentfully, not to say petulantly, not to tell anything more than he had to,—Mr. Burrage, on whose testimony reliance is placed to justify the existence of this institution, is unable to tell why it

was either necessary or desirable to organize the Amalgamated. Witness the following testimony:

"I cannot tell you why Mr. Rogers and associates, having acquired the control of these stocks which subsequently were transferred to the Amalgamated, he and his associates did not hold them, or why a separate corporation was organized which became the holder of these stocks; it is not within my knowledge as to why Mr. Rogers did not or did do a thing."

Record, pages 968-969.

It was organized for the same reason that the Northern Securities Company was organized, to hold the stocks of Mr. Hill and his associates—enough to control—of the Great Northern, Northern Pacific and Burlington, and for identically the same reason that that corporation was held to exist in violation of the Sherman law, this must be.

It was recently held upon the authority of the Northern Securities case that the acquisition by a holding company of the stocks of two competing coal companies presents the case of a combination in violation of the Sherman act.

U. S. vs. Reading Co., 226 Fed., 229, 271, 272.

That case is direct authority in support of the contention of the appellants as to the illegal character of the Amalgamated organization.

It was no doubt in anticipation of some express adjudication to that effect that the Amalgamated passed out of existence, and the title to the properties of all the companies it controlled was placed in the Anaconda.

The Sherman Anti-trust Act was not intended to

prevent the ordinary and usual contracts made in the course and development of a successful business, by which it is extended. But any departure from that course, as a consequence of which competing concerns are combined, is denounced by it.

In *United States vs. Union Pacific R. R. Co.*, 226 U. S., 61, Mr. Justice Day elucidated the "rule of reason," declared in the *Standard Oil and Tobacco Company* cases. In the course of the opinion he said that it was in those cases "pointed out that the statute did not forbid or restrain the power to make *normal* and *usual* contracts to further trade by resorting to all *normal* methods." Indeed, he but adopted the language of Chief Justice White in the *Tobacco Company* case.

In the brief of the Attorney General, in what is known as the *Anthracite Coal Company* case, the following propositions are said to be deducible from the decisions of the Supreme Court, viz:

"(a.) Any combination, not the 'result of normal methods of industrial development,' which by destroying competition between traders tends in the long run, if not immediately, to enhance prices and produce the other evils of monopoly, restrains and monopolizes trade.

"(b.) That a combination is not the 'result of normal methods of industrial development' may be determined by its own 'inherent nature or effect.'

"(c.) Where it does not appear from the 'inherent nature or effect' of a combination that it is not the 'result of normal methods of industrial development,' the question must be determined in the light of all the surrounding circumstances of the given case, including the purpose of the parties (*Standard Oil Co. vs. U. S.*; *U. S. vs. Am. Tobacco Co.*)."

Recurring to the case with which the brief deals, the author adds:

“Applying these principles to the present case, we have competition destroyed forever between two corporate owners, producers, buyers, and sellers of anthracite coal engaged in interstate commerce, by vesting control of each in a third corporation—a mere holding company—not itself engaged in mining or selling coal or any other business.”

Brief, p. 150.

And then the following observation in line with ideas heretofore advanced is made:

“Whilst within limits the acquisition and operation of the plants of competitive companies by a corporation actually engaged in trade may be deemed an incident of normal growth, the acquisition of the stocks of two or more such companies by a holding corporation, not itself engaged in trade, for the purpose of centralizing control, is no more a normal method of developing trade than the similar centralization of control in common trustees under the old form of trust. In such case, the holding company, indeed, is but the old trust in corporate form (Brief, p. 152).”

The views thus expressed are fully vindicated by the recent decision of the “Harvester Trust” case and by the opinions of the majority of the court.

Because it has been said that the Amalgamated has never been guilty of any “unfair competition” through which its rivals were wrecked that they might be absorbed, the following is quoted from the opinion of Judge Hook, exonerating the Inter-

national Harvester Company from accusations of that character:

U. S. *vs.* Int. Har. Co., 214 Fed., 987-1002.

“It is but just, however, to say and to make it plain that in the main the business conduct of the company toward its competitors and the public has been honorable, clean and fair. Some petty dishonesties were tracked in at the start, mostly some subordinates who had been in the service of the old company, but they were soon gotten rid of. In this connection it should also be said that specific charges of misconduct were made in the Government’s petition which found no warrant whatever in the proof. They were of such a character and there was so much of them, apparently without foundation, that the case is exceptional in that particular.” U. S. *vs.* Int. Har. Co., *supra*.

The organization was outlawed, not because of the methods it pursued, but because it came into existence and had its being in defiance of the law thus announced:

“Suppression of competition where the parties to a combination control a large portion of the interstate or foreign commerce in the articles, and where there is no obligation to form the combination arising out of the fact that the parties to the same are losing money or the like, has been held an undue restraint of trade. See

Continental Wall Paper Co. *vs.* Voight & Sons,
212 U. S., 227.

Same *vs.* Same, 143 Fed., 939.

Swift & Co. *vs.* United States, 196 U. S., 375.

Addyston Pipe Co. *vs.* United States, 175
U. S., 211; 85 Fed., 271.

Chattanooga Foundry Co. *vs.* Atlanta, 203 U.
S., 390.

Montague *vs.* Lowrey, 193 U. S., 38.”

There can be no doubt that if the six companies whose stock the Amalgamated obtained at the outset of its career—all prosperous, all vigorous—had entered into an agreement with each other to fix the price at which they would sell their product, providing therein that none should sell at a price less than that thus agreed upon, the contract would have been in plain violation of the statute. The same result was achieved by the control which the Amalgamated secured over them. It could not consult its own interest thereafter and allow these companies to compete. Touching this phase of the inquiry before us, equally presented in the Harvester case, the court, in the opinion therein, said:

“We think it may be laid down as a general rule that if companies could not make a legal contract as to prices or as to collateral services they could not legally unite, and as the companies named did in effect unite the sole question is as to whether they could have agreed on prices and what collateral services they could render when their companies were all prosperous and they jointly controlled 80 to 85 per cent of the business in that line in the United States. We think they could not have made such an agreement.

Continental Wall Paper Co. *vs.* Voight & Sons,
212 U. S., 227.

Same *vs.* Same, 148 Fed., 939.

Addyston Pipe Co. *vs.* United States, 175 U.
S., 211.

Swift & Co. *vs.* United States, 196 U. S., 375.”

And then, in line with the ideas heretofore advanced, borrowed from it, that the acquisition by the Anaconda of any one, possibly two, of the weaker

companies might not be illegal, the opinion continues:

“If the five companies which formed the International had been small and their combination had been essential to enable them to compete with large corporations in the same line, then their uniting would, in the light of reason, not have been in restraint of trade, but in the furtherance of it; but when they constituted the largest manufacturers of their articles in America, if not in the world, and held jointly about 80 to 85 per cent of the trade, and two at least of the companies forming the combination were prosperous, their combining was, when similarly viewed, an unreasonable restraint of trade.”

Either the Anaconda or the Boston & Montana, when control of them passed to the Amalgamated, “might have stood against the world.” Not one of the companies absorbed was shown to be in financial straits and was not. The essential facts presented here and thus far canvassed are identical with those with which the court dealt in the Harvester case, save that the consolidating companies therein considered controlled 80 to 85 per cent of the trade, those entering into the present combination from 25 to 45. It is impossible to differentiate the cases on that basis.

A further similarity appears. The opinion referred to continues:

“The International is not only a great manufacturing company, but by the American Company is a great dealer in agricultural implements in interstate and foreign commerce, and so the case comes more nearly within the ruling in *Addyston Pipe Co. vs. United States*, 175 U. S., 211, than *United States vs. Knight*, 156 U. S., 1.”

Not only was each of the subsidiary companies in this case a dealer in copper, selling through a sales agency in all the markets of the world, but that agency, becoming the United Metals Selling Company, in which Mr. Rogers was a stockholder from its organization about the time the Amalgamated came into being, is now controlled by the latter which owns all its capital stock, so that the last-mentioned company is not only the greatest producer of copper in the world, through its subsidiary, the Anaconda Company, but it is the greatest dealer in the world in that commodity.

The basis upon which it is believed the Amalgamated may escape the condemnation of the statute was not made clear at the argument. Much was made of remarks appearing in various opinions of the courts to the effect that the restraint of trade accomplished must be something more than an indirect, incidental interference, not the immediate necessary or probable result. But what was the main result to be accomplished to which the other result was only incidental? It is said that the consolidation was to effect economies. A similar reason has been assigned, and rarely without justification in the event, for the existence of every trust that ever came into being. It is confessed that, as a rule, economy of operation may be effected through relatively large units. But the people of the nation, while offering no obstacle, so far as the law is concerned, to the development of gigantic enterprises by "usual methods" or by making "normal and usual contracts," have chosen rather to maintain competition than to enjoy the advantage that may flow from combination.

In this connection it may be said that the power to regulate prices is by no means the only, though it may be the most commonly recognized, reason that makes monopoly objectionable or that induced the passage of the Sherman act.

See *International Harvester Co. vs. Missouri*, 234 U. S., 199, in which the character of the plaintiff in error was said to arise from the fact that there was "a union of able competitors and a cessation of their competition."

The Colorado Company chose rather, while it maintained an independent existence, to operate its own smelter than to have its ores treated at the Anaconda; so the Butte & Boston, and Heinze, and so, with his great business capacity and sagacity, did Senator Clark. It was not until they were each dominated by the Amalgamated that the policy of the constituent companies in that regard underwent a change. They did not have their ores smelted at Anaconda, because there would have been a smelter charge which would have more than overcome the loss incident to the operation of their less efficient works. That system would have impoverished them to enrich the companies which owned the smelters that were operated. It was profitable for the stockholders of the two greater companies to have the other smelters dismantled and profitable, of course, for the interests that dominated them all. But the subject of economy must have presented itself in quite a different aspect to the minority stockholders of the lesser corporations.

So, likewise, as to the apex controversies said to

have had a part in the matter. If the Amalgamated were the only holder of stock in any of the subsidiary companies, it would be of no consequence as to how these controversies were adjusted. Under the organization perfected, the power was placed in the Amalgamated to resolve them as best suited its interest. The minority holders were obliged to trust to its generosity and its justice. A judge is not allowed to sit in a cause in the result of which he is interested, so frail does the law recognize humanity to be. The law has no reason to approve of a combination either to effect such economics, or as a substitute for the courts in the resolution of apex controversies.

But there is no answer in any of these suggestions as to why the Amalgamated, the holding company, was organized. The economics referred to were made possible, not by the organization of the Amalgamated, but by the acquisition by the same persons of enough of the stock of the constituent companies to control them. If the same individuals held a majority of the stock of each, the same result would be possible. There was no occasion for a holding company to effect any such purpose. Hill and his associates might have elected directors of the Northern Pacific, the Great Northern and Burlington, controlling the stock of each as they did when they organized the Northern Securities Company. The trouble was that control of one company might at any time get away. That company might start cutting rates or otherwise begin to compete. It was to ensure the maintenance of control over all three roads that the

holding company was formed. The Amalgamated had its origin about the same time and it was organized with a similar purpose.

The consolidation out of which this litigation grows, the merging of all these companies in the Anaconda, is in the way of acceptance of the theory of economy advanced in justification of the organization of the Amalgamated. It was to effect economies that the new merger was accomplished, we are told. The old arrangement could not have permitted them if that is true. But the real reason for the new arrangement was given by Mr. Kelly to the witness Blum,—the Federal government is opposed to holding companies. An idea prevailed that the holding company could not be justified under the law. And there is no room for it in our industrial organization. It serves no purpose except the purpose of monopoly. So the District Court of the Eastern District of Pennsylvania held in the Reading case above cited.

As pointed out by President Van Hise an idea obtained that by uniting the property in one corporation the ban of the law might be avoided. An individual may acquire property, it was argued, in unlimited amount. Why not a corporation? But when subjected to the test, the Supreme Court held that the form which the consolidation takes is of no consequence. Immunity was claimed for the American Tobacco Company, because it had itself become the owner of the properties of the companies it absorbed, or at least it was claimed that it could not be divested of the properties so acquired. But Chief

Justice White, speaking of what had been decided in the Standard Oil case, said of the law that it

“embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.”

The Harvester Trust was formed on this plan. Referring to the language above quoted, the court said, in its opinion in the suit brought by the Government to dissolve it, after reciting the language last above quoted:

“No weight is attached therefore to the means by which the combination was formed if a combination within the purview of the statute was created. That it was a combination of five companies is clear. The fact that this combination took the form of a new corporation is immaterial.

U. S. *vs.* American Tobacco Co., 221 U. S., 106.

U. S. *vs.* E. I. du Pont de Nemours & Co., 188 Fed., 127.

“Was this combination in restraint of trade? It substantially suppressed all competition between the five companies, and the restraint of competition between combining companies is as illegal as destruction of competition between them without combining.”

The U. S. Steel Corporation acquired the properties of the companies absorbed by it, but the trans-

action fell, notwithstanding, under the condemnation of the court.

U. S. vs. U. S. Steel Corporation, 223 Fed., 178.

The Can Trust and the Kodak Trust have both been outlawed since the case was last argued.

U. S. vs. Am. Can Co., 220 Fed., 859-901.

U. S. vs. Eastman Kodak Co., 226 Fed., 62.

A mining company may prolong its life by the acquisition of adjacent mining property in the ordinary course of business, by making "normal and usual contracts" and by the "normal methods of industrial development," but if these terms mean anything they cannot include a process by which a corporation having a capital of \$30,000,000 becomes one with a capital of \$150,000,000, the additional stock being exchanged for properties of other companies engaged in a like business. Either the Red Metal Company was already controlled by the Amalgamated as the evidence compels us to believe, or it was engaged in competition with the former. If it was, then its absorption in 1910 was in violation of the Sherman act. Either the Alice Company was controlled by the Amalgamated or it was a potential competitor in the production of copper and the acquisition of its property was in contravention of the Sherman act. For no one can assert that it is in accordance with "normal methods" of industrial development for one corporation to go out into the market and purchase a majority of the shares of another corporation and then force upon the minority stockholders a sale for stock in either the purchasing

company or a third company. If it be so, “ ’tis a custom more honored in the breach than in the observance.”

It is impossible to doubt that the Amalgamated hoped to find the Alice properties copper-bearing.

It appears that the Anaconda is by exactly the same process gathering unto itself for some more stock which it contemplates issuing, the properties of the International Smelting and Refining Company figured at \$19,000,000, including a copper and lead smelter in Utah, a copper refinery in New Jersey and a lead refinery in Indiana.

It has already acquired extensive interests in Arizona and Mexico—holding stock in the Inspiration and Greene-Cananea, and is now constructing a smelter in Arizona.

Doubtless the projectors of the Amalgamated had in mind that they would dismantle the smelters of the Colorado and the Butte & Boston, of Heinze and Clark, and that they would otherwise institute economies, but, as pointed out, all trusts make like claims as a justification for their existence.

In the answer in the Harvester case was the following paragraph:

“Purpose of Organization.

“23. They aver that the purpose of the formation of the International Harvester Company was to secure large economies in the manufacture of harvesting machinery and other agricultural implements by producing more cheaply and of better quality the principal raw materials required therefor; by enlarging the facilities and at the same time correcting the

wasteful methods then employed in the distribution of such machines and which ultimately would have resulted in higher prices, or in serious curtailment of the service and credit extended to the farmers; by extending the foreign trade in such machines and implements, and by better organized experimental and inspection departments, making the machines and implements more durable and efficient, without increasing their cost to the farmer."

It has ever been contended that if such is the "paramount object" or if there be a paramount purpose, the restraint of trade that ensues from a combination of competing companies not coming about in "the ordinary course of industrial development," the law sanctions it. It was strenuously insisted upon in the Union Pacific case and disallowed by the court. If the purpose denounced by the act be present, or if the power to restrain trade exists by virtue of the consolidation, it is immaterial that there may be another purpose more potent in inducing the combination.

U. S. *vs.* Union Pacific, 226 U. S., 61.

Nor is it of consequence that the power has not been used to raise prices or otherwise oppress the public.

In the Harvester case the court quotes from one of the opinions of the Supreme Court of the United States to the effect that

"All the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."

In the Union Pacific case the court said:

“It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.”

In a late case presenting many features strikingly like those that are prominent in this one, the court said:

“The power under and pursuant to the combination to do the prohibited things is what brands it (the combination) as illegal, not the actual exercise of that power, although when a plaintiff sues for damages he must, of course, show the combination, its operation, and that it has resulted in damages to him. And of course, to bring a combination of this character within the condemnation of the statute, it is not necessary to show that a complete and United States wide monopoly has been actually created, or that the entire trade or business and production of an article has been brought within the control of the combination, or ever will be. It is no defense for such a combination to show that there is still some competition and some competitors, and that the acts of the combination do not wholly and entirely control interstate commerce in the article or absolutely fetter it. If the combination be one in restraint of trade or commerce among the several States to any substantial degree, it is within the condemnation of the statute.”

O'Halloran *vs.* Am. S. G. S. Co., 207 Fed., 187.

As heretofore asserted, the only difference in the essential facts surrounding the organization of the Amalgamated and the International Harvester Company is that the latter controlled a greater proportion of the trade. But the Amalgamated controlled as large a proportion of the copper production—say 30

per cent—as did the Reading Holding Company of the anthracite. Touching this phase of the case the Attorney General says in his brief:

“If it be said that the Reading Holding Company through its ownership of the stock of the Reading Railway Company and the Reading Coal Company controls only part of the trade in anthracite coal, the answer is that the Supreme Court has held over and over again that it need not be shown that the combination, in fact, results in a total suppression of trade, or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition. (*Northern Securities Co. vs. United States*, 193 U. S., 197, 332.”

And then he calls attention to the language of the second section of the act, which prohibits a monopoly of “any part” of trade or commerce, quoting from the opinion in *Standard Oil vs. U. S.*, 226 U. S., 161, as follows:

“The commerce referred to by the words ‘any part,’ construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance, that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.”

The question of the unlawful character of the Amalgamated Copper Company, not in its acts but in its organization, has thus far been canvassed as though the testimony of Mr. Lawson were not in the record, because at the argument counsel seemed to assume that the case rested, so far as that phase of

it goes, upon what was said by the witness. It may be totally disregarded and no warrant can be found in the law or the decisions under it for such an industrial combination as is being considered. The necessary inferences from its history condemn it.

It is conceded that giving credence to the evidence of Lawson, the institution exists in violation of the law. It developed, according to him, pursuant to a plan to monopolize the copper production of the world. It followed, hard upon the heels of the inglorious failure spoken of as the Secretan debacle, as the court knows historically. It may be that the purpose to take in the Rio Tinto mines was shadowy, a thing thought of rather than deliberately entered upon. It may likewise be that the acquisition of all the mines of the United States was regarded as an end ultimately to be reached rather than immediately to be attained, but that this corporation was organized as the "copper trust," intending through it to dominate the copper production of this country at least, there is no room for serious question, nor is there reason to doubt what Mr. Lawson tells about it. Indeed, it is not suggested upon what basis the court can discard this evidence or fail to give full value to it. There is nothing inherently unbelievable about it. Mr. Lawson is unimpeached upon this record. It was somewhat vehemently asseverated at the argument that his character as a stockbroker and his reputation as a writer of sensational magazine articles required the court to ignore his contribution to the history of this interesting venture in the field of high finance. The writer knows of no rule of law that will permit

the court to inform itself in any such manner. The witness gave his testimony in a manner altogether creditable. His story is uncontradicted in any of its essential features even by Mr. Burrage. It certainly suffers nothing in point of candor, frankness or credibility with that of the latter. The court cannot get the impression from the testimony of Mr. Burrage that he was making any effort whatever to enlighten anybody.

The total contribution as to the part that Mr. Lawson had in the organization of the Amalgamated, according to Burrage, is that Mr. Lawson made some suggestions.

Let us inquire as to what Mr. Lawson says he did aside from making "some suggestions." In the pursuit of his business as a stockbroker he gathered up for the Amalgamated promoters some of the stocks that went into the consolidation, Anaconda, B. & M., B. & B., and Parrot.

Though the Boston companies did not go in until later, the witness was even before 1899 accumulating the stocks of those companies for Mr. Rogers. He advertised in the Boston Herald of May 8, 1899, that the Amalgamated was formed to take over "*all sound producing copper companies*" that promised to pay 8 per cent. It will be remembered that the company itself put out an advertisement asking for subscription to its shares. The Lawson advertisement was published to induce them, and the two were printed in adjacent columns of the same paper.

Mr. Lawson tells that he wrote the company advertisement. The statement then made by Lawson, publicly in such a way as that it must have been

brought to the notice of the projectors of the Amalgamated, the adventurers, to use a more appropriate term which proved offensive to Mr. Burrage, touching their purpose, is in entire accord with the testimony he now gives in relation to the same matter. Just why the great copper producing properties were thus to be put in common ownership, the witness tells with a directness coming from a conviction that a great public good was to be achieved by the consolidation. This is what he says:

“In the carrying out of our general scheme, the general scheme which was contemplated all the way through, it would have been very essential to have the marketing of the whole product of the different mines controlled or owned by the consolidated company, as the very foundation idea of the whole scheme was the control of the price of the metal, control to an extent that we could keep the price from the wild fluctuations that had been the history of copper metals from the beginning. In other words, a control that would have enabled us to establish a fair price and to hold that fair price through the ups and downs of general business, through the periods when the metal would be in strong demand, when the demand would let up, and there would be accumulation or over-production, a temporary over-production, and the very essential of that would be a control in the sense which I stated, of the selling, of the getting the metal to the consumer.”

Record, pages 703-704.

Even if such a purpose could be considered as beneficent in character it is condemned by the law and the transaction is not saved by the good intentions of the parties to it.

In the Bathtub Trust Case, 226 U. S., 49, Mr. Justice McKenna said:

“The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results (*United States vs. Trans-Missouri Freight Asso.*, 166 U. S., 290; *Armour Packing Co. vs. United States*, 209 U. S., 56, 62).”

The intent with which the combination assailed in this case was formed is clear from its history without this direct evidence of the ends sought to be accomplished by its projectors, but the intent in this case is of very little consequence, the necessary effect of the combination being to place in the Amalgamated the power to restrain trade, the proof of intent to accomplish such restraint is unnecessary. It is only where it does not appear that the “inherent nature and effect” of the combination is to restrain trade that the proof of intent becomes material.

Justice Lurton said in

United States vs. Reading Co., 225 U. S., 324, 370:

“Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. (*U. S. vs. St. Louis Term. Assoc.*, 224 U. S., 383, 394; *Swift vs. U. S.*, 196 U. S., 375).”

By virtue of the combination effected, the Amalga-

mated might at any time close down the Washoe or the Colorado, or the Parrot or the Butte & Boston or the Boston & Montana or the Anaconda or any two or more or all of them, cutting the copper output of the country $33 \frac{1}{3}$ per cent. These companies were producing about 220,000,000 pounds of approximately 250,000,000 issuing from all the mines of Montana in 1899, being about 36 per cent of the world's production, and about one-half of the total output of the United States. The capital assembled was greater than that of any industrial organization which this country ever knew or has since known, the United States Steel, the American Tobacco Company and the Standard Oil Company alone excepted. If it is not one of the organizations at which the Sherman act was aimed, its language and the history of the times in which it was enacted, the debates in Congress that attended its passage, are alike without any lesson.

Reliance is placed upon the Calumet and Hecla case now practically overruled as recited above. The highest respect is due to the views of the late Justice Lurton expressed therein; but no student of the decisions dealing with the Sherman act can fail to recognize, as the business world recognizes, that those of more recent date have given a vigor and efficacy to that statute that was denied to it by the courts at an earlier period in its history.

Justice Van Devanter wrote the opinion of the Circuit Court of Appeals justifying the Union-Pacific-Southern Pacific merger, which the Supreme Court, by the unanimous voice of the judges, declared to be in plain violation of the law. The decision in the Calumet & Hecla case is put by Justice

Lurton and by the learned district judge below squarely upon the principle announced in the Knight case. President Taft declared that that case had been overruled by the Supreme Court. Many able lawyers agree with him and agree likewise that the statute would have been an innocuous thing if the doctrine of the Knight case had not been repudiated. The writer does not believe it has been overruled, but he believes that if the Knight case were now prosecuted the result would be different. It announced what seems to the writer an incontrovertible doctrine, namely, that given a case which presents only a question of production within a State, and the Sherman act is inapplicable; that notwithstanding its pains and penalties, companies who do all their business within a State, who therein manufacture a product that will eventually in whole or in part find its way into interstate commerce, may consolidate as they please without violating the Sherman act.

One can conceive of a half dozen sugar-beet factories in Montana which do no interstate business at all. They get all their beets in Montana and sell their product at the factories to buyers who take it away. The Sherman act cannot reach them. The arm of the Federal law cannot touch them. The Knight case was tried as though it presented such a case. Doubtless the sugar companies involved did, in fact, transport their product beyond the State of Pennsylvania for sale, were indeed engaged in interstate commerce, but if so, either the attorneys for the Government failed to make the proper averment or that feature of the case was disregarded by the court. I do not pretend to say whether the Knight case was or

was not properly applied in the Calumet & Hecla case. It is neither governing nor persuasive here. It clearly appears that each of the companies besides being engaged in *producing* copper in Montana was engaged in transporting for sale and selling it through sales agents all over the world. And it further appears that at the very time the Amalgamated was organized, the United Metals Selling Company came into existence, with Mr. Rogers as one of the stockholders, that it handled the product of the Amalgamated companies and was eventually absorbed by it. Mr. Lawson declares that its organization was a part of the general plan of control pursuant to which the project was launched in the first place.

The Knight case has been appealed to in the case of every trust condemned by the Supreme Court or the inferior courts since it was decided. (See U. S. *vs.* Am. Tobacco Co., 164 Fed., 700, in which its inapplicability to the ordinary trust case is demonstrated by three of the judges comprising the court.)

Reliance was placed upon it in the Harvester case, but it was disposed of by the court in a brief paragraph heretofore quoted. As if to meet the conditions with which it dealt, the International Harvester Company organized a selling company to which each factory turned over its product in the State in which it was situated. The court found this subterfuge unavailing.

The contention was made upon the oral argument that a stockholder cannot be heard to assert that a conveyance made to consummate a combination forbidden by the Sherman act is void, or ask the interposition of the court to arrest it. The *Calumet & Hecla Case*, 155 Fed., 876, is a direct authority to the contrary, but none would seem to be necessary. There is a want of power on the part of either the directors or the majority of the stockholders to make a conveyance denounced by the Federal law, whatever the local statute may say.

Union Pacific Case, 226 U. S., 86.

The court in the suit of a private party does not undertake to dissolve the offending combination or administer upon its property. It simply gives the peculiar relief to which the complainant is entitled.

The case of

Frank vs. U. P. R. R. Co. and St. Joseph & G. I. Ry. Co. (U. S. District Court, Nebraska, decided May 27, 1914), 226 Fed. 901.

was, like this, a case brought by a stockholder who founded his action on a claim that the directors had violated the trust reposed in them by entering into a combination in violation of the Sherman act. On that point the court said:

“Where a violation of the Sherman act exists, such as is shown in this case, the minority stockholders may maintain a suit in equity to enjoin the special injury to their interests resulting from the acts in defiance of that statute, and need not await action on behalf of the United States seeking a dissolution of the wrongful ownership.”

The same conclusion was reached in

De Koven *vs.* L. S. & M. S. Ry. Co., 216 Fed.,
955-957.

The question can no longer be considered an open one. The authorities holding that a private party who connects himself in no way, who shows no property right in either of two corporations entering into a combination, cannot be heard to attack a transaction as being in violation of the Sherman law, are, of course, not in point.

The case of

MacGinniss *vs.* B. & M. Co., 29 Mont., 428,

proceeded upon the same principle. The right of the stockholder to bring the action was vindicated by the court in its opinion. It is not to be regarded as any precedent on the merits of this case, however. The statute there considered denounced combinations entered into *for the purpose of fixing the price* or regulating production.

29 Mont., 452.

Testimony was given that, notwithstanding the acquisition of a majority of the stock of the B. & M., the Amalgamated had never exercised or attempted to exercise any control over its affairs. Against this were the reasonable probabilities of the case. But the court held that the mere possession of the power to regulate competition or fix prices would not make the combination amenable to the law. It is enough to say that the Supreme Court of the United States has repeatedly held, as heretofore pointed out, that

under the Federal act it is sufficient that the combination has such power, whether it exercises it or not. Its latest declaration is found in the opinion in

International Harvester Co. vs. Missouri, 234
U. S., 199.

The essential difference between the statute of Montana as construed by the Supreme Court thereof and the Federal statute is expressed in the following:

“The preventing of the engrossment of trade is as definitely the object of the law as is price regulation of commodities, its prohibition being against combinations ‘made with a view to lessen, or which tend to lessen, lawful trade or full and free competition in the importation, transportation, manufacture or sale of any commodity or article or thing brought or sold.’ See *Standard Oil Co. vs. United States*, 221 U. S., 1; *United States vs. American Tobacco Co.*, *Id.*, 106; *United States vs. Patten*, 226 U. S., 525.”

Though the statute referred to was that of the State of Missouri, its identity, in the particular pointed out with the Federal law, is assumed, if not declared. The same idea is conveyed by the following from page 209.

“It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. *Armour Packing Co. vs. United States*, 209 U. S., 56, 62; *Standard Sanitary Mfg. Co. vs. United States*, 226 U. S., 20, 49. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it.”

If a combination "tends" to defeat competition, it is unlawful. Such was the character of the combination which has been the subject of this study.

Some argument was made in the lower court to the effect that while a stockholder might arrest a transfer of the property of a corporation, if he moved before it became effective, equity could give him no relief if the conveyance had already been made—in other words, that a stockholder may enjoin a sale, being *ultra vires*, but that he cannot have it annulled. The doctrine thus announced is appealed to as against the claim of the appellants last argued; perhaps as against all the grounds urged by them as a basis of relief. It does not seem necessary to dwell upon this contention. What is a stockholder to do when the officers of a corporation fraudulently or *ultra vires* convey away its property before he knows anything about the purpose to do so? What is he to do when they exchange it for other property through the ownership of which the corporation is embarked in a business foreign to that for which it is created?

It is said that equity is a race between the rogue and the chancellor. Here is a case, according to appellees, in which the chancellor confesses himself beaten in a real race.

Certainly a transfer or a purchase tainted with fraud on the stockholder, either actual or constructive, is not immune from attack by him. Nor is one that is *ultra vires*. The principle to which appeal is made has no proper application. A corporation may

be barred either by estoppel or acquiescence, or by virtue of the principle that equity will not interfere to annul a deed made in the course of an unlawful transaction in the prosecution of which both parties were equally guilty. The maxim applicable is trite. But it has not been applied with the same rigor by the Supreme Court of the United States as by some State courts.

Central T. Co. *vs.* Pullman's P. C. Co., 134 U. S., 24.

So a stockholder may be estopped. One may become estopped from asserting that a deed is a forgery. But unless he is barred by acquiescence a stockholder may have rescission as freely as he may have injunction. How can he be charged with being *particeps* when he protests against a sale and it is made in spite of his resistance?

The foundation of the rule that a corporation may not itself maintain a suit to annul a deed made by it *ultra vires* is pointed out in

Long *vs.* G. P. Ry. Co., 24 Am. St., 931.

"Stockholders may in equity sometimes set aside *ultra vires* acts done by a corporation, which the corporation itself may not take advantage of."

Wis., etc. *vs.* Green, etc., 109 Am. St., 381-395.

Relief appropriate to the case is granted,
X Cyc., 990,

including cancellation.

X Cyc., 992.

Rescission is an appropriate action against corporate directors charged with *ultra vires* acts.

III Pomeroy's Equity, 1093 (2d ed.).

The Decree Directing a Public Sale.

If the contention of the appellants is correct as to any one of the four grounds upon which they attack the sale, they are entitled to a decree annulling it. The learned district judge declined to express any view upon whether the transaction falls under the condemnation of the Sherman law, asserting that as appellants were entitled to full relief on another ground, he would not rule on that feature of the case. He intimated, however, the existence of some doubt in his mind as to the right of stockholders to invoke the statute, though conceding that language found in
Shawnee Compress Co. *vs.* Anderson, 209
U. S., 423,

points to a different conclusion and that some support for the same view might be found in

Boyd *vs.* Ry. Co., 220 Fed., 180.

Record, pages 179-180.

He held, as appellants understand the opinion, that regardless of the Utah statute, the majority stockholders of the Alice might, under the conditions disclosed, sell all its property, but that they had no right to sell for stock of the Anaconda; that owing to the relations between the last-named company and the Alice and particularly because Ryan, the business manager of the Anaconda, was a director of both

companies and the president of the last named, the burden was upon the appellees to show that an adequate price had been paid for the property and that that burden had not been sustained. And he ruled, in accordance with the conclusions recited, that the dissenting stockholders had a right to have the value of the property subjected to the "acid test" of a public sale. The decree went, accordingly, that the property should be offered at public sale and should stand confirmed or be set aside, as thereat the property did or did not produce more than the value of the stock given for it by the Anaconda, found to be a million and a half.

This decree is indefensible. In the first place, if any such disposition of the case is justifiable, the other grounds urged being considered, the court ought not to have ignored the contention that the transaction is in contravention of the anti-trust statute. If, indeed, the full relief to which the appellants would be entitled, had the court held that the Sherman law forbade the absorption of the Alice by the Anaconda, was awarded, then it was unnecessary to pass upon the applicability of the statute and the right of appellants to invoke it. But was it? It is to be assumed, for the purpose of this inquiry, that the court held that appellants may urge the statute and that the transaction falls within it and is denounced by it. Would it be appropriate to decree that such a transaction, so adjudged to be in violation of the law, may stand if more is not offered at a public sale than the perpetrators of the crime, for so it is denounced in the law, gave for it?

Undeniably if this sale contravenes the Sherman

law and the court has power to act in this suit at all on that ground, it must unconditionally set the sale aside. It can give no countenance to such a transaction, whatever may have been paid for the property or whatever it may be worth.

If the contention made by the appellants that the sale is void because forbidden by the Sherman law is sound, the decree must be reversed with directions to enter one annulling it absolutely.

In the second place, a sale at public auction is not an "acid test" of value at all. Indeed it is no test. It is so far from being a test that many courts have refused even to permit evidence of what property brought at a judicial sale at public auction to be admitted in proof of value.

Those which countenance admission of testimony of that character refer disparagingly to it as being *some* evidence of value.

The Supreme Court of New Jersey said in

Martinett vs. Maczkewez, 35 Atl., 662:

"In inquiries of this nature it has been customary to show the market value of the property if it has a fixed rate of that kind, and, if it has no such estimation, to prove its value by the opinion of experts, and by an exposition of the state and condition of the things sold. In such an inquisition the price obtained at a sheriff's sale would seem to be wholly valueless. When a willing seller and a willing buyer agree and fix the price of an article, it is obvious that it is reasonable to infer that such estimation approximates closely to the real value of such article; but in an official sale by auction the owner has no voice in the affair, and each bidder is striving to obtain the thing sold, not at its actual worth, but at a bargain. It is vain to deny, for all experience attests the fact, that,

as a general thing, the attendants at a public auction of personal property are there with the expectation of acquiring the articles purchased much below their cost in the market, and it is deemed that, as criteria of real value, such transactions can have no effect except to mislead."

The rule thus announced was applied in

In re McAusland, 235 Fed., 173, 189-190.

In the opinion of the Court of Civil Appeals of Texas, prices realized at forced sales possess but slight evidentiary weight.

Rickards & Co. vs. Bemis & Co., 78 S. W., 239.

The market value of property and what it will bring at a forced sale are two quite different things.

Street Ry. Co. vs. Walsh, 94 S. W., 860.

It would unquestionably be error for a court to instruct a jury that the value of property is what it would bring at a judicial auction sale.

The desperate debtor begs for an opportunity to sell off his property at private sale to satisfy his obligations rather than to have it disposed of under the hammer, long experience and obvious reasons convincing even the dullest minds and the least sagacious intellects that the full value is rarely, if ever, realized at such a sale. It is ventured that in all the history of equity jurisprudence in this country, or in England, no similar decree can be found in which the court, having held that a sale was made upon an inadequate consideration, the circumstances being such as to impose upon the purchasers the burden of prov-

ing adequacy, ordered an auction sale at an upset price, being that paid on the sale held to be fraudulent.

The term is used in no opprobrious sense, as indicating a deliberate purpose to wrong. Reference is made to that class of sales denounced by the courts because of the relation subsisting between the buyer and the seller in consequence of which the law casts upon the former the burden of proving that full value was given. In many, if not most such cases, the wronged suitor is impecunious. He might as well submit in silence if all he can hope for is that his property will, if he succeeds, only be offered for sale at public vendue to the highest bidder.

The appellants in this case were utterly unable to bid, themselves, upon this property. They had not the means to enter the competition. A sale of mining property at public auction, because of the difficulty of arriving at its intrinsic value, would probably result in a greater proportionate loss to the owners than almost any other kind. Bidders who would be obliged to go to at least \$1,500,000 would not be numerous under any circumstances. The Anaconda had accurate and reliable information concerning the property in question and the surrounding country. It could explore and operate the Alice ground at less risk and cost than any one else. Mr. Gillie testified, as must be obvious, that the ground is worth more to the Anaconda than to any one else. With its corps of chemists and metallurgists, its smelters with their laboratories, it could work out at a minimum cost the problem of treating the refractory zinc ores. It could penetrate the old workings

by either drifts or cross-cuts, from the Moose shaft or the Badger State shaft. Why should any bidder appear to compete with it at the auction sale ordered? Every one who had \$2,000,000 or thereabouts, for so much it took, which he was willing to invest in a non-producing mining property, knew in advance that the Anaconda could afford and could well afford to give just a little more than he was justified in offering for the property, and in all probability would raise his bid. He would have some chance if the sale should be made upon sealed bids instead of at public auction. The appellants asked that the sale be made upon sealed bids, but their request was refused, perhaps properly in view of the Federal statute on judicial sales.

Moreover a prospective bidder would recognize that should he be successful an appeal would, in all probability, be taken by the appellees from the decree to this court, and eventually to the Supreme Court, with a possibility of a reversal. Meanwhile, he could not prudently make expenditures for the development of the property, and nearly \$2,000,000 of his capital would be tied up for two years, certainly, and possibly for as many as four. It should be stated that the upset price was fixed at \$1,500,000 with the amount of the dividends which the Alice had been paid on the Anaconda stock, and other items aggregating almost the great sum last above named.

No one could successfully bid against the Anaconda and no one appeared to bid. The reason given is not the only one that would naturally deter bidders. It was evident that those in control of the Anaconda wanted this property for that company. They gave

no evidence of being simply desirous of disposing of it that those in such friendly relations with them, the stockholders of the Butte Coalition, or any other stockholders of the Alice, might get the benefit of the bargain being offered. They wanted the property. Successful bidders would have thwarted their purposes and their plans. The newcomers would have been regarded as interlopers in the camp. Few people would care to invest \$2,000,000 in mining property in Butte and so much more as might be required to develop it, the property having been wrested from the Anaconda in a lawsuit. The conditions were not such as to invite bidders. .

The event was what might have been anticipated. The decree held the word of promise to the ear but broke it to the hope. And it directed a disposition of the property to which neither the Alice nor any of its stockholders ever assented and in respect to which there never was any corporate action whatever. The court certainly has no power to dispose of the Alice property according to its plan because it cannot sanction the method by which it was disposed of through action formally taken at a meeting of its directors, in form ratified at a meeting of its stockholders. It was never proposed by any one to a meeting of the Alice stockholders, that the property be put up and sold to the highest bidder, and certainly the property of the company cannot be sold without a vote of the stockholders regularly assembled. Nor was it proposed that the property be sold to the Anaconda Company for 30,000 shares of its stock unless at a public auction some one should bid more than \$1,500,000, the value of such stock. The

Anaconda never offered to take the property on such terms. For reasons advanced heretofore, it had no disposition to let the property get away from it by inviting a free and open competition. It did not do so when it sought to invest itself with the title to the Boston & Montana properties, or those of the Parrot or of the Red Metal Company, or any of the other constituent companies of the Amalgamated. By that plan the properties which the Amalgamated had been at such pains and at such cost to unite in one control might have passed into the control of sundry individuals or corporations, restoring the condition that prevailed prior to 1899.

It was not in its plans to invite or permit any such contingency, so it submitted to none of the companies a proposition to give a certain number of shares of its stock should they respectively not realize a sum greater than the value thereof at an auction sale to be held. Certainly it neither dealt nor offered to deal on any such basis with the Alice and its stockholders. The court made a contract for the parties, which neither of them ever assented to.

The learned judge believed such a decree warranted, even suggested, by

Mason *vs.* Pewabic Mining Co., 133 U. S., 50.

The error into which the court fell resulted from overlooking the fact that the corporation whose affairs were under investigation in that case was dissolved. Its charter had expired and under the law the former directors had become trustees whose duty it was, as such, to sell off the property of the corpora-

tion, reduce it to cash with all reasonable expedition and distribute the avails among its stockholders.

This principle is referred to in the opinion of Mr. Justice Miller in the *Pewabic Mining Company* case.

Instead of discharging this duty the directors continued to carry on the business of the company for a year and then a meeting of the stockholders, held as though the corporation were a living thing, in form empowered the directors to sell the property of the defunct corporation to a new company for stock therein, the resolution directing the sale containing a proviso that "in case a stockholder does not take stock of the new corporation he is to receive his pro rata share in money." "The bill," to quote from the opinion, "prayed for the appointment of a receiver to take charge of the effects of the *Pewabic Mining Company*, that they might be sold, the debts of the company paid, and the remainder of the proceeds distributed among the stockholders."

133 U. S., 53.

The directors, as trustees, having failed to perform their duty, it was asked that a receiver be appointed by the court through whom it would be done. The defendant trustees, on behalf of a company organized to take over the property of the old corporation, offered to award to the dissenting stockholders their proportionate share of the stock of the new company or to pay them for it on the basis of \$50,000 for the entire property. They conceded it to be worth \$75,000 and the master found it to be of the value of \$498,412.24, and it actually brought \$710,000 as will

appear from the report of the case on a second appeal in

145 U. S., 349-361.

The provision was easily overlooked by both parties as of no consequence. The contentions of the parties are thus stated on the second appeal:

“The minority appealed to the courts, and there the litigation was carried on for years; the minority insisting upon a sale, the majority upon the transfer of the property to a new corporation.”

145 U. S., 356.

The decree ordered a sale, as prayed, but directed that in case no bid in excess of \$50,000 should be received, the resolution referred to should be carried out and payment made to complainants on the basis of \$50,000 as the value of the company's property. The complainants in that case got more than they asked. They asked a sale, they got it, and they got it with a guarantee that in no event should they realize on their stock on a basis of less than \$50,000 as the value of the property of the company. The defendants were continuing their offer to pay on that basis. The decree practically ordered a sale with an upset price.

The complainants here are not asking for a sale. They are protesting against a sale. It may have been sagacity or it may have been obstinacy on their part, but the event has proved the wisdom of the stand they took in 1910 and have ever since maintained that the time was not opportune to sell then, however opportune it may have been for the Anaconda to buy.

It is a part of present general scientific information, of which the court takes judicial notice, that a prodigious advance has been made since 1910 in the economic treatment of zinc ores and that the appellee, the Anaconda Copper Mining Company, has since erected great works, world renowned, for the reduction of zinc ores electrically. It is equally a matter of common knowledge that the price of zinc and copper has made extraordinary, not to say phenomenal, advances in the last two years.

Whether the trial court, in the Pewabic case, was justified in giving to the complainants the guarantee which the decree accorded them, did not become the subject of review. Obviously it was to the interest of the complainants to have the protection it gave them, and though they appealed from the decree, averring error in the refusal of the court to give them an accounting, they made no complaint of the proviso referred to. The defendants appealed from the decree and complained of that part which ordered a sale, but made no complaint of that part which operated to confirm the proceedings they had taken if no bid in excess of \$50,000 should be received. The essential difference between that case and this lies in the fact that the Pewabic Company had been dissolved by operation of law and the court *had* to order a sale. This distinguishing feature is referred to in some comment on the case in

4 Thompson on Corporations (2d ed.), 4613.

It is respectfully insisted that upon each of the grounds urged the sale in question should be adjudged to be null and void, and that this court should direct a decree accordingly.

Respectfully submitted,

WALSH & NOLAN,
Solicitors for Appellants.

T. J. WALSH,
Counsel for Appellants.

4
No. 2855

United States
Circuit Court of Appeals
For the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Montana.

Filed

SEP 83 1916

F. D. Monckton,
Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Montana.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer.....	11
Assignment of Errors.....	33
Attorneys of Record, Names and Addresses of..	1
Bill of Complaint.....	2
Bond on Appeal.....	37
Citation on Appeal.....	40
Clerk's Certificate to Transcript of Record....	42
Decision of February 4, 1916.....	31
Decree.....	23
Decree of February 10, 1916.....	29
Mandate.....	25
Motion for Judgment and Decree.....	27
Names and Addresses of Attorneys of Record..	1
Opinion.....	15
Order Directing Entry of Decree.....	22
Order for Allowance of Appeal.....	37
Petition for Appeal and Allowance.....	35
Praecipe for Transcript of Record.....	41
Subpoena.....	9

Names and Addresses of Attorneys of Record.

BURTON K. WHEELER, Esq., United States
Attorney, Butte, Montana,

Solicitor for Complainant and Appellee.

C. B. NOLAN, Esq., and WILLIAM SCALLON,
Esq., Helena, Montana,

Solicitors for Defendant and Appellant.

*In the District Court of the United States, in and for
the District of Montana.*

IN EQUITY—No. 11.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

BE IT REMEMBERED, that on the 11th day of
August, 1913, complainant filed its bill of complaint
herein, being in the words and figures following, to
wit: [1]

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant. [1*]

*Page-number appearing at foot of page of original certified Record.

Bill of Complaint.

To the Judge of the District Court of the United States, District of Montana:

The United States of America, by James W. Freeman, United States Attorney for the District of Montana, under authority and by the direction of the Attorney General, brings this bill of complaint against the Ash Sheep Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, and by reason thereof a citizen and resident of said State and District of Montana; and thereupon shows unto your Honor:

1. That the said defendant, the Ash Sheep Company, at all the times hereinafter mentioned, has been and now is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Billings, Montana, and as such corporation has been and now is engaged in the buying and selling of sheep and other livestock in the State and District of Montana, and carrying on and conducting all such business and operations as are necessarily incident to the buying and selling of sheep in the State and District of Montana.

2. That on or about the 12th day of August, 1868, this complainant and the Crow tribe of Indians entered into, concluded and then and there was promulgated a treaty by which the United States of America set aside for the use and benefit of the [2] said Crow tribe of Indians that certain reservation within the State and District of Montana, which has

since been and now is known as the Crow Indian Reservation.

3. That during all of the times hereinafter mentioned this complainant was and now is the owner and lawfully entitled to the possession of all those certain tracts of land situate, lying and being within the original boundaries of the Crow Indian Reservation and a part thereof, in the State and District of Montana, and described as follows: Section twenty-seven (27), township two (2) north, range thirty-six (36) east; section twelve (12), township one (1) north, range thirty-six (36) east; sections six (6) and seven (7), township four (4) north, range thirty-six (36) east of Montana principal meridian. That all of said lands are reserved lands and a part of the lands reserved and set aside by the said United States for the use and benefit of the said tribe of Crow Indians, in said State and District of Montana.

4. That the lands hereinabove described are a part of the vacant ceded Indian lands of the said Crow tribe of Indians and that the Indian title to the same has not been extinguished and that said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior of the United States concerning Indian lands that have been opened for settlement and entry, dated November 27, 1911, and the Act of Congress of the United States approved April 27th, 1904 (33 Statutes at Large, page 352), entitled "An Act to ratify and amend an agreement with the Indians of Crow Indian Reservation in Montana, and making appropriation to carry the same into effect.

5. That on or about the 14th day of July, 1913, the exact date thereof being now unknown to complainant and for that reason [3], not more definitely alleged, and ever since said date, this defendant, the Ash Sheep Company, in violation of the rules and regulations of the Secretary of the Interior of the United States and said Act of Congress aforesaid, grazed and caused to be grazed upon the tracts of land hereinabove described, and other vacant ceded Indian lands reserved for the use and benefit of said Indians, and subject to the rules and regulations and Act of Congress hereinabove referred to, a more particular description of said lands is now to complainant unknown, a large number of sheep, to wit, about seven thousand one hundred (7,100) head; that the said sheep are being grazed, and are now trespassing in and upon the respective tracts of land hereinabove described; that the defendant company, acting by and through its agents, servants and employees, has not obtained authority or any permit whatsoever to graze and cause to be grazed said sheep in and upon the land hereinabove specifically described, as provided by the rules and regulations of the Department of the Interior of the United States, or any other officials of the complainant thereunto duly authorized.

6. And complainant further avers that grazing permits have been duly and regularly issued by its duly authorized agents to certain persons authorizing and permitting said persons to graze their stock, to wit, horses and cattle, upon all of the lands hereinabove described; that said persons to whom permits

have been issued have complied with all the rules and regulations made and promulgated by the Secretary of the Interior in that regard and have paid all fees required thereunder.

7. Complainant further avers that the said defendant, the Ash Sheep Company, acting through its officers, agents, servants and employees, are now grazing and will continue to graze said seven thousand one hundred head of sheep in and upon the lands hereinabove referred to unless restrained by this court; that [4] such action on the part of the said defendant company and its agents, servants and employees constitutes a continuing trespass and will materially injure and destroy the use and value of said lands and cause irreparable damage to this complainant, and deprive the Crow Indians of the benefits thereof; and that unless restrained by this Honorable Court the defendant, in defiance of the express mandate of the law so enacted by the Congress of the United States, will continue to graze said seven thousand one hundred head of sheep without due and lawful authority therefor first had and obtained, and said defendant now claims to have the right to so maintain said sheep in and upon said lands so held by the United States of America for the use and benefit of the Crow Indian nation, and will thereby prevent and prohibit the United States from asserting any right whatsoever in said lands.

8. That the said defendant, the Ash Sheep Company, in all of its operations hereinbefore described, has been and will act through divers of its officers, agents and employees; that the names of said officers,

agents, servants and employees are to this complainant unknown and for that reason they are not made parties to this cause in their own individual names. Complainant avers, however, that unless such officers, agents, servants and employees of the said defendant are likewise restrained by an order of this Court, they will continue to trespass upon said lands, as aforesaid, and this complainant will, when the names of said officers, agents, servants and employees shall be ascertained, ask this Honorable Court permission to enjoin said officers, agents, servants and employees as party defendants in this cause. That in consequence of the said acts of defendant company, complainant and the said Crow Indians herein have been and are being deprived of the benefit of said lands and premises, and complainant alleges that by reason thereof [5] the said Crow Indians and this complainant as hereinbefore set forth have sustained damages in the sum of seven thousand one hundred dollars (\$7,100).

All of which actions, doings and pretenses of the said defendant and its said officers, agents, servants and employees are contrary to equity and good conscience and tend to the manifest injury and oppression of complainant in the premises.

WHEREFORE, forasmuch as complainant is remediless in the premises according to the strict rule of common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable;

To the end, therefore, that said defendant, the Ash Sheep Company, may full, true, direct and perfect

answer make to all and singular the matters and things hereinbefore stated and charged, but not on oath (its answer on oath being hereby expressly waived), as fully and particularly as if the same were here repeated and it thereunto distinctly interrogated; that the said defendant, the Ash Sheep Company and its officers, agents, servants and employees, during the progress of this cause and thereafter finally and perpetually may be enjoined from so grazing said seven thousand one hundred head of sheep on and upon said lands so described, and from occupying, using and trespassing on and upon said lands without having first obtained due and proper permission or authority from the Secretary of the Interior of the United States of America, and that the said defendant, its officers, and agents, be enjoined from employing or contracting with any individual, individuals, corporation or corporations not connected with or in the employ of said defendant from continuing the trespass hereinabove complained of, and from entering upon or going on the said lands, and that the said complainant may have and recover from said defendant the sum of seven thousand one hundred dollars (\$7,100) damages; and [6] that the said complainant may have such other and further relief in the premises as may be considered just in this Honorable Court and agreeable to equity and good conscience.

May it please your Honor to grant unto this complainant a writ of subpoena of the United States of America, issued by and under the seal of this Honorable Court directed to the said defendant, the Ash

Sheep Company, thereby commanding it at a certain time and under a certain penalty therein to be limited to appear before this Honorable Court and then and there full, true and direct answer make to all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made against it in the premises, as shall seem fit and meet and agreeable to equity.

JAMES W. FREEMAN,
United States Attorney,
District of Montana. [7]

United States of America,
District of Montana,—ss.

James W. Freeman, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting United States Attorney for the district of Montana; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and things therein contained are true to the best of his knowledge, information and belief.

JAMES W. FREEMAN.

Subscribed and sworn to before me this 11th day of August, A. D. 1913.

[Seal]

GEO. W. SPROULE,
Clerk.

[Indorsed]: Title of Court and Cause. Bill of Complaint. Filed Aug. 11, 1913. Geo. W. Sproule, Clerk. [8]

Thereafter, on August 11, 1913, a subpoena in equity was duly issued herein, being in the words and figures following, to wit: [9]

Subpoena.

UNITED STATES OF AMERICA,

*District Court of the United States, District of
Montana.*

IN EQUITY.

The President of the United States of America,
Greeting: To Ash Sheep Company, a Corporation,
Defendant.

You are hereby commanded, that you be and appear in said District Court of the United States aforesaid, at the courtroom in Federal Building, Helena, Montana, on the 1st day of September, 1913, to answer a Bill of Complaint exhibited against you in said court by The United States of America, Complainant, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

WITNESS, the Honorable GEO. M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, this 11th day of August, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the 138.

[Seal]

GEO. W. SPROULE,

Clerk.

By _____,

Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
SUPREME COURT U. S.

You are hereby required, to file your answer or other defense in the clerk's office of said court on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso*.

[Seal]

GEO. W. SPROULE,

Clerk.

By _____,

Deputy Clerk.

JAS. W. FREEMAN,

U. S. Atty.,

Solicitor for Complainant,

Helena, Montana. [10]

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within writ on the 11th day of August, 1913, and personally served the same on the 12th day of August, 1913, by delivering to, and leaving with Ash Sheep Company, a corporation, by Christ Yegen, President of said corporation, said defendant named therein personally at Billings, in the County of Yellowstone, in said district, a copy thereof with him, together with a true copy of affidavit of J. W. Freeman, U. S. Attorney, motion for preliminary injunction, motion for restraining order and bill of complaint in said cause.

Helena, August 12th, 1913.

WILLIAM LINDSAY,

U. S. Marshal.

By Charles Morgan,

Deputy.

[Endorsed]: No. 11. U. S. District Court, District of Montana. In Equity. United States vs. Ash Sheep Co. Subpoena. Filed Aug. 20th, 1913. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [11]

Thereafter, on Aug. 25, 1913, Answer was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY,

Defendant.

Answer.

Now comes the defendant and for answer to complainant's bill of complaint:

I.

Admits the allegations of paragraphs one and two.

II.

Admits the allegations of paragraph three, except that it denies that the lands referred to in said paragraph are reserve lands, and denies that the said lands are set aside by the United States for the use and benefit of the Crow Indians. In that connection, it alleges that the lands in question were ceded to the United States by the said tribe, and that said lands are a portion of the public domain of the United States; the said tribe having no claim there-

to, except that the proceeds from the disposition of said lands, to the extent provided for in the treaty and act of Congress providing for their cession shall be turned over to said tribe.

III.

Answering the allegations of paragraph four, admits that the lands referred to in said paragraph were part of the said Indian [12] lands, but denies that the Indian title has not been extinguished, and denies that the said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior, in so far as the rules and regulations referred to provide that permits to said lands shall be granted for rentals provided, and the rentals so provided turned over to the Crow Indians. In that connection defendant alleges that said lands are public lands of the United States and that the Indian title to same has been extinguished.

IV.

Answering the allegations of paragraph five, admits that sheep belonging to defendant, to the number specified in the bill of complaint, graze on the tracts of land described, but denies that the lands upon which they graze were reserved for the use and benefit of the Indians, and denies that the use of said lands is subject to the rules and regulations of the Indian Department, and denies that so grazing any trespass was committed.

Admits, however, that no permit to graze said sheep on said land, pursuant to the rules and regulations of the Interior Department was obtained. In that connection, however, defendant alleges that the

lands in question were public lands of the United States, and that pursuant to the policy of the Government of the United States, as to the free use of public lands for grazing and pasturage purposes, defendant a citizen of the United States, owning the sheep in question, asserted its right under that privilege and policy, and grazed its sheep on said lands.

V.

Answering the allegations of paragraph six, defendant has no knowledge or information sufficient to form a belief. [13]

VI.

Answering the allegations of paragraph seven, admits that it is grazing its sheep, and will continue so to do on said land, unless restrained from doing so.

Denies that its doing so is a trespass, and denies that the grazing of said sheep will materially or at all destroy the value of said lands.

Denies that its grazing said sheep in the manner herein set forth is in violation of the law, and admits that it claims to have the right to graze said sheep upon the said lands.

Denies that its grazing its sheep on said lands is in violation of any right of ownership in the United States of America, and, in that connection, avers that its grazing its sheep on said lands is in accordance with the express wish and policy of the Government of the United States, as to the use of public lands, including the land in question.

VII.

Answering the allegations of paragraph eight, admits that it will continue to use said land for graz-

ing purposes, unless restrained from so doing, and admits that its officers and agents, in the handling of said sheep will likewise do so, unless restrained.

Denies that in consequence of the acts of defendant, complainant or the Crow Indians have been deprived of the benefit of said lands, and denies that by reason of the acts charged, or of any other acts, the Crow Indians and the complainant, or either of them, have or will sustain damage in the sum of seven thousand one hundred dollars, or any other sum or amount.

Denies that the acts charged in the complaint are contrary to equity and good conscience, or either, or tend to the manifest injury of the complainant. [14]

Further replying to said paragraph, denies that complainant is without remedy at law, and denies that relief is obtainable only in equity.

Further answering said bill of complaint, defendant alleges that in the bill of complaint there are set forth two causes of action which cannot be joined, to wit, a cause of action in equity asking for injunctive relief on account of trespasses alleged to have been committed, and a cause of action for the enforcement of a penalty, pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and that by reason thereof in the bill of complaint in question there is a misjoinder of causes of action.

Further answering said complaint and that portion of same where damages are sought for the sum of seven thousand one hundred dollars, defendant avers that the claim for damages in question is made

pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and as such, is a claim based on the enforcement of a penalty, and as such, is a claim that cannot be enforced in equity.

WHEREFORE, having answered complainant's bill of complaint, defendant prays that complainant's bill be dismissed, and that it be awarded its costs in this behalf expended.

C. B. NOLAN,

WM. SCALLON,

Solicitors for Defendant.

Due personal service of within Answer made and admitted and copy received this 25th day of August, 1913.

J. W. FREEMAN,

Solicitor for Complainant.

[Indorsed]: Title of Court and Cause. Answer. Filed Aug. 25, 1913. Geo. W. Sproule, Clerk. [15]

That on the 19th day of August, 1913, the Memorandum Decision of the Court was duly filed herein, being in the words and figures following, to wit:
[16]

United States District Court, Montana.

UNITED STATES,

vs.

ASH SHEEP CO.

Opinion.

Herein, the order to show cause is vacated (and

thereby the temporary restraining order is discharged.

Aug. 19, 1913.

BOURQUIN, J.

MEMO.

The Court will later extend its reasons. Briefly, they are that the Departments have no authority in the matter of public lands save to the extent conferred by Congress; that the Indian title to the lands involved, which was one of only occupancy and use, has been extinguished, the trust declared by the statute being but to the proceeds of sale of said lands; that Congress incorporated the lands in the general mass of public lands, directing they be opened to settlement and sale; that this confers no authority to lease or grant exclusive grazing privileges; that to lease or grant such exclusive privileges is counter to the implied license to general grazing, the policy of the Government for more than 100 years; that to set aside this policy and establish a new policy of exclusive lease or permit will not be implied where not necessary, and to accomplish it requires congressional sanction; that until said lands are settled upon or sold, they are open to general grazing, and exclusive permits to graze said lands are without authority and legal sanction, and are void. [17]

United States District Court, District of Montana.

UNITED STATES,

vs.

ASH SHEEP COMPANY.

By agreement, ratified by Congress, the Crow In-

dians ceded a part of their reservation in Montana to the United States. The granting clause is that "The said Indians . . . do hereby cede, grant and relinquish to the United States all right, title and interest which they may have to the lands" therein described. The agreement provided for a definite and unconditional money consideration. This latter was modified in the ratifying Act, to the effect that in consideration of the cession, the United States agreed to dispose of said lands at not less than \$4.00 per acre and pay the proceeds to said Indians. The Act further provided that all said lands were subject to withdrawal and disposition under the Reclamation Act so far as feasible, and those not so withdrawn "shall be disposed of under the homestead, townsite and mineral-land laws . . . and shall be opened to settlement and entry by proclamation of the President"; that when in the judgment of the President no more of said lands "can be disposed of at said price . . . he may . . . sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interests concerned"; that the United States was not bound to purchase any of said land or to dispose thereof except as in the Act provided, or to guarantee to find purchasers, "it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the

proceeds received from the sale thereof only as received."

Act April 27, 1904.

Said lands were opened to the general settlement and entry by the President's proclamation of May 24, 1906. Much thereof has been disposed of, some by sale by virtue of the aforesaid power given [18] the President, and upon the remaining land and for the benefit of the Indians aforesaid the Bureau of Indian Affairs with the sanction of the Secretary of the Interior assumes to grant exclusive grazing privileges for a price.

Regulations have been prescribed by them providing that with the written consent of the superintendent of the reservation the licensee may fence and otherwise improve the lands; that the license may be revoked in the discretion of the Secretary of the Interior and is revoked *pro tanto* by any *bona fide* settlement upon sale or entry of any said lands, with proportionate refund of the consideration paid by the licensee; that upon expiration of the license all improvements placed upon the lands shall remain thereon and become the property of the equitable owner of the land; and that said superintendent must prevent trespasses upon said lands and prosecute trespassers.

This is a suit to enjoin defendant from trespassing and grazing upon said lands without a permit and upon which permits have issued to others.

An order to show cause issued and a temporary restraining order accompanied it. It now appears

that on May 14, 1913, a permit as aforesaid issued to a cattle company to graze a maximum number of cattle upon all such unsold and unentered lands in about eighteen townships and estimated to be 204,000 acres, for one year and renewable for four years, the consideration being \$15,300 yearly, the Secretary of the Interior reserving the right to issue to residents on or adjacent to said lands permits to also graze a limited number of cattle thereon during the same time and at the same rate, "provided that such permittees pay a proportionate share of the actual cost of water development and provided that permittees of this permit have not their full amount of cattle on the range, the consideration of any such permits to be deducted from the consideration mentioned in this permit."

The contention for complainant is that the lands involved are yet so far Indian lands, that the Indians are entitled to the use and benefit thereof until the lands are finally sold, and that in the meantime to the Indians use and benefit the Interior Department has authority to issue exclusive grazing permits as aforesaid for a consideration.

The defendant maintains that such permits would impede settlement [19] and sale of the lands and are contrary to the intent of Congress.

The Court is of the opinion that the Interior Department has not the power claimed. The Indians' "right, title and interest" in the lands involved were at the time of the aforesaid agreement, of occupancy and use only, the fee being in the United States.

They relinquished all thereof to the United States

and the latter accepted the same. The purpose was to effectuate the policy of breaking up tribal relations, of settling the Indians upon separate tracts of individual ownership in fee, and of disposing of surplus lands to others for a consideration for the benefit of the Indians and ultimately to the benefit of the community and nation.

By this the Indian title to the lands was extinguished and thereafter they were no longer Indian country. The lands were to be disposed of under the general public land laws in the main, and not to revert to the Indians under any circumstances. Thereupon the lands were or became wholly territory and property of the United States, full dominion over which is by the Constitution vested in Congress, to be disposed of as the latter willed. By the Act aforesaid, Congress incorporated the lands in the general mass of public lands, subject to all the incidents of the latter, and to be likewise disposed of as aforesaid. In so far as said Act creates a trust, it would seem that it is merely precautionary, not intended to enlarge the Indians' right, title or interest in the lands nor to create a reversion therein, but attaching to only the proceeds of sales of the lands.

The President and the Interior Department are the instruments to execute the will of Congress in the disposition of public lands. They have no authority and power therein save that derived from some act of Congress.

The Act here involved confers upon them authority and power to sell the lands, but neither expressly nor by implication does it empower them to prescribe

grazing regulations in respect to said lands and to issue exclusive licenses thereon for a consideration or at all. Even if a trust attaches to the lands, a trust to sell gives no power to lease. It can be nothing but a qualified trust, the lands approximating public lands in general and with all the incidents of the latter, including the hereinafter mentioned implied license of common grazing. And any trust herein is to the Government as trustee, not to the Interior Department. The policy of the Government from its foundation has been to permit free and unrestrained grazing of the public lands. It impliedly [20] licenses all comers to enjoy this privilege. The benefits of this policy are many and compensatory. It promotes settlement and disposition of the public lands. It aids the settler, to whom the Government's policy has always been liberal, to establish himself. It increases and cheapens the country's supply of meats. See *Buford vs. Houtz*, 133 U. S. 326. The Act involved indicates no purpose to reverse this policy or to revoke this license, and it will not be implied. In fact, Congress has steadily refused to authorize leases of the public lands, though on occasion, by express enactment, has authorized the Interior Department to lease certain Indian lands. Furthermore, the aforesaid regulations and licenses of the Interior Department tend to impede settlement and sale of the lands and thus to defeat the intent of Congress.

True, the lands subject to the license are still open to settlement and sale, but the average settler would hesitate to invade the domain or enclosure of a cor-

poration or other licensee. He would fear, with or without reason. And settling therein he would place himself where all grazing privileges were denied him. Other reasons are obvious. It is believed that the Interior Department in the matter of the aforesaid grazing permits is without the sanction of Congress.

Upon the whole, the Court is persuaded that the defendant is not a trespasser upon the lands involved and that it can lawfully enter upon and graze thereon. It follows that the order to show cause should be and is vacated.

August 19, 1913.

GEO. M. BOURQUIN,
Judge.

Filed Aug. 19, 1913. Geo. W. Sproule, Clerk.
[21]

Thereafter, on December 16th, 1913, order for decree was filed and entered herein, being in the words and figures following, to wit:

United States District Court, Montana.

UNITED STATES,

vs.

ASH SHEEP CO.

Order Directing Entry of Decree.

Herein, for reasons set out in its order denying a preliminary injunction, the Court holds complainant has no cause of action and a decree will be entered for defendant, dismissing the suit.

Dec. 16th, 1913.

BOURQUIN, J.

Filed and entered Dec. 16th, 1913. Geo. W. Sproule, Clerk. [22]

Thereafter, on December 26, 1913, a Decree was duly filed and entered herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Decree.

This cause came on for final hearing before the Court on the 17th day of December, 1913, upon the bill of complaint and the answer, and was argued by counsel, and thereupon, upon consideration thereof, in accordance with the reasons set out by the court in its decision filed herein on August 19, 1913, vacating the order to show cause and discharging the temporary restraining order previously issued, wherein it was held by the Court that the Indian title to the lands involved in this controversy, to wit:

“Section twenty-seven (27), township two (2) north, range thirty-six (36) east; section twelve (12), township one (1) north, range thirty-six (36) east; sections six (6) and seven (7), township four (4) north, range thirty-six (36) east of Montana Principal Meridian.”

has been extinguished, and that Congress has incorporated the said land in the general mass of public lands, to be opened to settlement and sale, and that exclusive permits to graze said land are void, and without legal authority and legal sanction, it is

ORDERED, ADJUDGED and DECREED as follows, viz.:

That complainant's bill of complaint herein be, and the same hereby is, dismissed.

Dated December 26, 1913.

GEO. M. BOURQUIN,

Judge.

[Indorsed]: Title of Court and Cause. Decree. Filed and Entered December 26, 1913. Geo. W. Sproule, Clerk. [23]

Whereupon, said pleadings, process and final decree are entered of final record herein in accordance with the law and the practice of this court.

Witness my hand and the seal of said court at Helena, Montana, this 26th, day of December, A. D. 1913.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk. [24]

Thereafter, on June 30th, 1915, the Mandate of the Circuit Court of Appeals was duly filed and entered herein, in the words and figures following, to wit:

Mandate.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable the Judges of the District Court of the United States for the District of Montana, GREETING:

Whereas, lately in the District Court of the United States for the District of Montana, before you, or some of you, in a cause between United States of America, Complainant, and Ash Sheep Company, a Corporation, Defendant, No. 11, a Decree was duly filed and entered on the 26th day of December, A. D. 1913, dismissing the complainant's Bill of Complaint; which said Decree is of record in the said cause in the office of the clerk of the said District Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by United States of America, as appellant, against Ash Sheep Company, a corporation, as appellee, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 22d day of October in the year of our Lord one thousand nine hundred and

fourteen, the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, and that this cause be, and hereby is remanded to the said District Court with directions [25] to enter judgment for the complainant for the injunction prayed for and for such damages as the Court may find the complainant entitled to.

(March 8, 1915.)

YOU, THEREFORE, ARE HEREBY COMMANDED, That such execution and further proceedings had in the said cause in accordance with the Opinion and Decree of this court and as according to right and justice and the laws of the United States ought to be had, the said Decree of the said District Court notwithstanding.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 24th day of May, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America the one hundred and thirty-ninth.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

(Filed and entered June 30, 1915. Geo. W. Sproule, Clerk.)

Thereafter, on Jan. 26, 1916, motion for judgment was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, District of
Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs. [26]

ASH SHEEP COMPANY, a Corporation,

Defendant.

Motion for Judgment and Decree.

Now comes the complainant, United States of America, and respectfully shows to this Honorable Court;

That the above-entitled cause was duly commenced in this court, and that thereupon a temporary restraining order was issued together with an order to show cause why a preliminary injunction should not be issued, and that upon the hearing of said order to show cause a decree was entered discharging the temporary restraining order, vacating the order to show cause and dismissing the complainant's bill of complaint;

That thereupon the complainant appealed said cause to the United States Circuit Court of Appeals for the Ninth Circuit, where the decree of this court was reversed and said cause was remanded to this court with directions "to enter judgment for the complainant for the injunction prayed for and for

such damages as the court may find the complainant entitled to.”

That on the 24th day of May, 1915, mandate issued from said United States Circuit Court of Appeals for the Ninth Circuit, and by order of this court, on motion, said mandate was filed and entered of record in this cause on the 30th day of June, 1915.

The complainant therefore, now moves the Court for final decree and judgment in said cause upon the allegations set forth and contained in the complainant’s bill of complaint, the admissions set forth and contained in the defendant’s answer and the law as laid down in said mandate and opinion, granting to the complainant the injunction prayed for in said bill of complaint together with damages in the sum of \$7,100.

B. K. WHEELER,
United States Attorney. [27]
HOMER G. MURPHY,
FRANK WOODY,
Assistant United States Attorneys.

Service of the foregoing motion accepted and copy thereof received this 24th day of January, 1916.

C. B. NOLAN and
WM. SCALLON,
Attorneys for Defendant.
(Filed Jan. 26th, 1916. Geo. W. Sproule, Clerk.)

Thereafter, on Feb. 10, 1916, a decree was duly filed and entered herein, in the words and figures following, to wit:

*District Court of the United States, District of
Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Decree of February 10, 1916.

This cause came on regularly to be heard on the 31st day of January, 1916, upon the motion of the complainant for judgment on the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, and upon the pleadings on file in said cause, and was by counsel for complainant and defendant submitted to the Court and by the Court taken under advisement;

And it appearing to the Court, and the Court finds, as appears by its decision and memo filed herein and being hereof made a part, that the complainant is entitled to a perpetual injunction [28] against the defendant, as prayed for in the bill of complaint, together with a judgment for the sum of one dollar nominal damages and costs of suit; and upon consideration thereof, and the Court being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the said defendant, and its officers, agents, ser-

vants, attorneys and employes be, and they are hereby perpetually enjoined and restrained from grazing the sheep of said defendant upon the lands, of any thereof, particularly mentioned and described in the plaintiff's bill of complaint;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said complainant have and recover of and from the defendant the sum of one dollar damages and its costs and disbursements incurred in said action taxed in the sum of —— Dollars.

Done in open court this 10th day of February, 1916.

GEO. M. BOURQUIN,
Judge.

(Filed and Entered Feb. 10, 1916. Geo. W. Sproule, Clerk.)

WHEREUPON, said Mandate, Motion for Judgment and Decree are entered of final record herein, in accordance with the law and practice of this court.

Witness my hand and the seal of said Court at Helena, Montana, this 10th day of February, A. D. 1916.

[Seal]

GEO. W. SPROULE,
Clerk.

By C. R. Garlow,
Deputy Clerk. [29]

That on the 4th day of February, 1916, Memo Opinion of the Court was duly filed herein on the words and figures following, to wit:

*In the District Court of the United States in and for
the District of Montana.*

No. 11.

UNITED STATES OF AMERICA,

vs.

ASH SHEEP COMPANY.

Decision of February 4, 1916.

This is a suit to enjoin defendant from grazing sheep on lands now determined to be Indian lands held in trust by plaintiff (221 Fed. 587), and for damages.

Plaintiff contends that it is entitled to recover one dollar per head of sheep grazed, by virtue of Sec. 2117 R. S., which provides that any one who drives any "stock of horses, mules or cattle, to range and feed on any land belonging to an Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock." This is impossible for several reasons:

First, the statute contemplates lands so far in Indian occupancy and control that grazing will be an injury to the Indians and to which they may consent. The lands involved are otherwise.

Second, the penalty expressly attaches to "horses, mules or cattle" and sheep are not thereby included. It is apparent that Congress had in mind the particular and limited definition of the word "cattle"—

animals of the bovine genus—and not the general and extended meaning—all animals of domestic kind. Otherwise, horses and mules would not have been specially mentioned, or would have been so mentioned as to indicate but enumeration of particulars of a general class following. To illustrate, “horses, mules or any other cattle.” For [30] horses and mules are within the general meaning of “cattle,” even as sheep, swine, etc. are. Examination of the Acts of Congress, and especially Indian legislation, makes manifest that Congress practically invariably uses the word “cattle” in the limited sense of bovine animals, and for general inclusion makes use of the words “stock,” “useful domestic animals,” and “livestock.” In the earliest legislation to penalize grazing Indian lands, the prohibition was of “horses or cattle,” and the same act provided that the Indians would be supplied with “useful domestic animals.” 1 Stat. 747. Range animals were intended, and sheep were not then ranged. *U. S. vs. Mattock*, Fed. Cas. 15,744 is to the contrary, but seems to lay too much stress upon the mischief intended to be remedied. A case is not within a penal statute though within the mischief of, unless also within the legislative intent as disclosed by the language used. It would seem Congress had in mind only the three classes of range animals, horses, mules and bovines, and fixed a proportionate penalty for punishment and not for confiscation as it often would be if applied to sheep or swine.

Third, if the complaint is sufficient for penalties, equity never aids the collection of statutory penal-

ties. True, equity having jurisdiction retains it for full relief. But this for remedial and not punitive purposes. Here, for injunction and compensatory damages, and not for punishment of which are penalties.

Fourth, the appellate tribunal remanded the suit "with directions to enter judgment for the complainant for the injunction prayed for and for such damages as the Court may find complainant entitled to."

That is the law of the case.

There is no evidence of substantial damages, and for the technical trespass nominal damages are awarded.

Decree will be entered for an injunction, one dollar damages and costs.

BOURQUIN, J.

Filed Feb. 4, 1916. Geo. W. Sproule, Clerk. [31]

Thereafter, on August 2, 1916, defendant filed its Assignment of Errors herein as follows, to wit:

*In the District Court of the United States, District of
Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled cause, and files the following Assignment of Errors

upon which it will rely upon its prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 10th day of February, 1916.

I.

The District Court of the United States, in and for the District of Montana erred in ordering a decree herein in favor of the complaint and against the defendant.

II.

Said Court erred in rendering and entering a decree herein in favor of the complainant and against the defendant.

III.

Said Court erred in holding and finding and decreeing that the complainant was entitled to damages.

IV.

The Court erred in not finding in favor of the defendant.

V.

The Court erred in finding for the complainant.

VI.

The Court erred in finding that the defendant was not entitled to run or graze its sheep on the premises described in the complaint.

VII.

The Court erred in not finding that the defendant was [32] entitled to run and graze its sheep on the lands described in the complaint.

VIII.

The Court erred in awarding an injunction to the complainant.

C. B. NOLAN,
WM. SCALLON,

Solicitors for Defendant.

Due personal service of foregoing Assignment of Errors made and admitted and receipt of copy acknowledged this 2d day of August, 1916.

B. K. WHEELER,
Solicitor for Complainant.

(Filed Aug. 2d, 1916. Geo. W. Sproule, Clerk.)

[33]

Thereafter, on August 2, 1916, Petition for Allowance of Appeal was filed herein as follows, to wit:

*In the District Court of the United States, District of
Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Petition for Appeal and Allowance.

The above-named defendant, Ash Sheep Company, a corporation, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 10th day of February, 1916, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the Assign-

ment of Errors filed herewith, and it prays that its appeal be allowed, and that a citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such cases made and provided.

And your petitioner further prays that a proper order relating to the security to be required of it be made.

ASH SHEEP COMPANY.

By C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant.

Due personal service of foregoing Petition for appeal made and admitted and receipt of copy acknowledged this 2d day of August, 1916.

B. K. WHEELER,
Solicitor for Complainant.

(Filed Aug. 2d, 1916. Geo. W. Sproule, Clerk.)
[34]

Thereafter, on August 9, 1916, an Order Allowing Appeal was duly filed herein as follows, to wit:

*In the District Court of the United States, District of
Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Order for Allowance of Appeal.

On reading and considering the petition of the defendant in the above-entitled cause for the allowance of an appeal herein and its assignment of errors filed in the office of the clerk of the District Court of the United States, in and for the District of Montana, on the 2d day of August, 1916;

IT IS HEREBY ORDERED that the appeal of the defendant from the judgment and decree rendered and entered in said cause on the 10th day of February, 1916, is hereby allowed; the defendant-appellant to give bond, as required by law, in the sum of three hundred dollars ,(\$300.00).

WM. W. MORROW,

United States Circuit Judge and Judge of the U. S.

Circuit Court of Appeals for the Ninth Circuit.

(Filed Aug. 9th, 1916. Geo. W. Sproule, Clerk.)

[35]

Thereafter, on August 9, 1916, Bond on Appeal was duly filed herein as follows, to wit:

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That we, the Ash Sheep Company, a corporation, as

principal, and American Surety Company of New York, as surety, are held and firmly bound unto the above-named United States of America in the sum of Three Hundred Dollars (\$300) lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves jointly and severally and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated this 2d day of August, 1916.

WHEREAS, the above-named defendant, Ash Sheep Company, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse a decree rendered and entered in the above-entitled cause in the United States District Court for the District of Montana on the 10th day of February, 1916;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Ash Sheep Company, a corporation, shall prosecute its said appeal to effect and answer all costs, if it fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect. [36]

It is expressly agreed by American Surety Company of New York, the surety above named, that in case of a breach of any condition of this bond, the Court may, upon notice of not less than ten days to said American Surety Company of New York proceed summarily in this action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment against the said Amer-

ican Surety Company of New York, and award execution therefor.

ASH SHEEP COMPANY.

By C. B. NOLAN,

WM. SCALLON,

Its Solicitors.

AMERICAN SURETY COMPANY OF
NEW YORK.

TED E. COLLINS,

Resident Vice-President,

[Seal] Attest: HOMER G. MURPHY,
Resident Assistant Secretary.

The foregoing Bond on Appeal is hereby approved
this 5th day of August, 1916.

WM. W. MORROW,

United States Circuit Judge and Judge of the Cir-
cuit Court of Appeals for the Ninth Circuit.

(Filed Aug. 9th, 1916. Geo. W. Sproule, Clerk.)

[37]

Thereafter, on August 9, 1916, a Citation duly
issued on August 5, 1916, was filed herein, which
original Citation is hereto annexed and is in the
words and figures following, to wit: [38]

*In the District Court of the United States, District
of Montana.*

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Citation on Appeal.

United States of America,—ss.

To United States of America, and to B. K. Wheeler,
Esq., United States District Attorney for the
District of Montana:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the clerk of the District Court of the United States in and for the District of Montana, wherein United States of America is complainant and appellee, and Ash Sheep Company, a corporation, is defendant and appellant, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM W. MORROW, Judge of the United States Circuit Court of Appeals for the Ninth Circuit this 5th day of August, 1916.

WM. W. MORROW,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Due personal service of the within Citation on Appeal made and admitted and receipt of copy acknowledged this 9th day of August, 1916.

BURTON K. WHEELER,
Solicitor for Complainant,
U. S. Attorney. [39]

[Endorsed]: No. 11. In the District Court of the United States, in and for the District of Montana. United States of America, Complainant, vs. Ash Sheep Company, a Corporation, Defendant. Citation on Appeal. Filed Aug. 9th, 1916. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.
[40]

Thereafter, on August 26, 1916, Praeceptum for Transcript on Appeal was duly filed herein as follows, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Praeceptum for Transcript of Record.

To Burton K. Wheeler, Esq., United States Attorney for Montana, Attorney for the Plaintiff, and to George W. Sproule, Esq., Clerk of said Court:

You will please incorporate the following papers in the transcript on appeal:

1. The final record in said cause filed herein on February 10, 1916;
2. The memorandum decision of the Court and complete decision the Court rendered and filed therein on the 19th day of August, 1913;
3. Order of court made and entered in said cause on the 16th day of December, 1913, ordering a decree

in favor of said defendant and dismissing complainant's bill of complaint;

4. Memorandum decision of the Court filed February 4, 1916;

5. The appeal papers herein, consisting of the petition and allowance, assignment of errors, bond and citation on appeal.

This praecipe for the papers and files to be included in said transcript on appeal.

Dated this 9th day of August, 1916.

C. B. NOLAN,
WM. SCALLON,

Solicitors for Defendant.

Due personal service of the foregoing praecipe and a copy thereof this 12th day of August, 1916, is hereby admitted and acknowledged.

BURTON K. WHEELER,
Solicitors for Plaintiff.

U. S. Attorney.

(Filed Aug. 26, 1916. Geo. W. Sproule, Clerk.)

[41]

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 42 pages, numbered consecutively from 1 to 42 inclu-

sive, is a true and correct transcript of the pleadings, process, orders, decrees, decisions, and all other proceedings in said cause required to be incorporated in the record on appeal, therein by the praecipe of the appellant for said record on appeal, including said praecipe, and of the whole thereof, as appears from the original records and files of said Court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Eighteen and 50/100 Dollars, and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 29th day of August, A. D. 1916.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
8/29/16. C. R. G.] [42]

[Endorsed]: No. 2855. United States Circuit Court of Appeals for the Ninth Circuit. Ash Sheep Company, a Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed September 1, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2855.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

vs.

ASH SHEEP COMPANY, a Corporation,

Appellant.

APPELLANT'S BRIEF

C. B. NOLAN,
WM. SCALLON,
Attorneys for Appellant.

Filed

SEP 24 1912

F. D. Mondragon

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellee,

vs.

ASH SHEEP COMPANY, a Corporation,

Appellant.

APPELLANT'S BRIEF

Statement of the Case

This is an appeal from a decree entered by the District Court of the United States for the District of Montana on the 10th day of February, 1916, in favor of the appellee and against the appellant. The suit was brought by the United States to enjoin trespasses by appellant on certain lands alleged to be a part of the Crow Indian Reservation in the State of Montana. It is averred that on or about the 12th day of August, 1868, the United States and the Crow Indians entered into a treaty, as a result of which, the Crow Indian Reservation was created, and that the lands trespassed on were within the boun-

daries of the Reservation so created; that they were ceded lands, to which the Indian title had not been extinguished, and were subject to the regulations formulated by the Secretary of the Interior November 27, 1911, and the act of Congress approved April 27, 1904. (33 Stat. at Large, page 352); that the defendant company grazed upon the described lands on or about the 14th day of July, 1914, and thereafter, 7100 head of sheep; that grazing permits for this land had been issued to others who paid the agreed fees for so doing; that the appellant in grazing the sheep was committing a continuing trespass, causing irreparable damage; that by reason of the trespass committed, the Crow Indians were deprived of the used lands, to their damage and to the damage of the United States in the sum of \$7100.00. An injunction was prayed for, and also a judgment for \$7100.00. (Bill of complaint, Tr. pp. 2-8).

In the answer, it is alleged that the lands were ceded to the United States by the Indians and were a portion of the public domain; that the Indians had no interest in them, except the interest which arose by being entitled to the proceeds, as provided by the act of Congress, which provided for the ceding of the lands. The answer denied that the Indian title had not been extinguished, and denied that the regulations of the Interior Department had application as to the issuance of permits. There is a denial that damages were sustained to the amount of \$7100.00 or any sum or

amount. The answer, likewise, sets forth that in the bill of complaint, there was a misjoinder of causes of action; one in equity, asking for injunctive relief, and the other for the enforcement of a penalty, pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and it was, likewise, set forth that the damage item was a penalty and could not be enforced in an equitable action. (Answer, Tr. pp. 11-15).

On the hearing on the order to show cause, the order was vacated (Tr. p. 15) and the restraining order theretofore issued was dissolved. (Tr. pp. 15 and 16). Subsequently, the cause was heard and a decree was entered dismissing the bill of complaint. (Tr. p. 23).

An appeal was taken to this court, and a reversal of the decree was ordered, and the cause was remanded, with directions to enter judgment for the United States for the injunction prayed for, and for such damages as the court should find the plaintiff entitled to.

United States v. Ash Sheep Co., 221 Fed. 582, (See mandate, Tr. p. 25).

Upon the remanding of the cause and upon its consideration by the trial court, the United States moved for a final decree, insisting on its right to recover the penalty of \$7100.00. There was no proof as to damages, and a decree was entered, pursuant to the mandate of this court, permanently enjoining the Ash Sheep Company from trespassing upon the land, and fixing the damages at

one dollar. (Tr. p. 29). From this decree, the Ash Sheep Company has appealed. (Tr. pp. 35-37).

Specification of Errors

I.

The court erred in rendering and entering a decree in favor of the United States against the appellant.

II.

There was error in holding that the lands in question were not public lands of the United States, and that the defendant did not have the right to graze its sheep thereon.

III.

There was error in holding that the lands were subject to the control or regulation of the Indian Department.

IV.

There was error in holding that the lands were still to be treated as Indian or Reservation lands.

V.

There was error in holding that the Indian Department had a right to give leases on said land or to exclude sheep therefrom or to prohibit grazing thereon.

Argument

This court in this case reversing the District Court, remanded the cause, with directions to enter judgment in favor of the United States, permanently enjoining the Ash Sheep Company from grazing its sheep on the lands which were tres-

passed upon, with directions, likewise, to ascertain the damages done on account of the trespasses committed. There was an absence of proof to show that substantial damage had been done by reason of the grazing complained of, and nominal damages were awarded, and a decree was rendered permanently enjoining the company from grazing its sheep on the lands and for nominal damages. From this decree the company has appealed, and in the consideration of the appeal, it desires to present anew the question considered on the former appeal as to whether or not the land in question is public domain. The taking of this appeal was thought necessary by reason of the institution of a new suit by the United States to recover the penalty provided for by Section 2117 of the Revised Statutes of the United States, so that the question as to whether this land is public domain would not be foreclosed from review by the Supreme Court of the United States, should it be found necessary to submit the question to that tribunal. When the case was considered by this court and disposed of, it was remanded with directions to enter judgment for the complainant for the injunction prayed for, and for such damages as the court might find the complainant entitled to. This being the order, nothing could be done in the case until a final judgment was rendered. The final judgment being rendered, an appeal was then taken, and the hearing on the appeal has been continued from time to time to

await the disposition of the action brought by the United States to recover the penalty. In the latter action in the District Court a judgment was rendered in favor of the Ash Sheep Company, and from the judgment so rendered, the United States has taken an appeal, and, as already stated, so that the decision of this court in the former appeal should not foreclose the consideration of the question as to whether the lands in question were public or were subject to the jurisdiction of the Indian Department, should it ultimately be adjudged the penalty prayed for was recoverable, the present appeal was taken.

We recognize at the outset the difficult task assumed in attempting to change the views heretofore declared by the majority of this court. We do so, however, with sanguine expectation of succeeding. The land alleged to be the land trespassed on was a portion of the Crow Reservation. An agreement was entered into by the Government and the Crow Indians, by which a cession of the lands was made to the Government, and for this land the Government was to pay \$1,150,000.00. This agreement was modified and amended, so that instead of paying this money as originally provided for, it was agreed in consideration of the grant, cession and relinquishment of the land, that the United States should dispose of the same under the provisions of the Reclamation Act, the Homestead Act, the Townsite Act and the Mineral Land Laws, except as to Sections sixteen

and thirty-six, at not less than four dollars an acre, and as to the accepted sections, the Government would pay for them one dollar and twenty-five cents an acre.

33 Stat. at Large, 352.

Section 5 of the Act provides as follows:

“That before any of the lands by this agreement ceded are opened to settlement or entry the Commissioner of Indian Affairs shall cause the allotments to be made and the schedule to be prepared, as provided for in section four of this Act, and a duplicate of said schedule shall be filed with the Commissioner of the General Land Office. Upon the completion of such allotments and the filing of such schedule and after the sale or removal of such improvements the residue of such ceded lands, except sections sixteen and thirty-six, or lands in lieu thereof, which shall be reserved for common school purposes, and are hereby granted to the State of Montana for such purpose, shall be subject to withdrawal and disposition under the reclamation Act of June seventeenth, nineteen hundred and two, so far as feasible irrigation projects may be found therein. The charges provided for by said reclamation Act shall be in addition to the charge of four dollars per acre for the land, and shall be paid in annual installments as required under the reclamation Act; and the amounts to be paid for the land shall be

credited to the funds herein established for the benefit of the Crow Indians. If any lands in sections sixteen and thirty-six are included in an irrigation project under the reclamation Act, the State of Montana may select in lieu thereof, as herein provided, other lands not included in any such project, in accordance with the provisions of existing law concerning school land selections. In any construction work upon the ceded lands performed directly by the United States under the reclamation Act, preference shall be given to the employment of Crow Indians, or whites intermarried with them, so far as may be practicable: *Provided, however,* That if the lands withdrawn under the reclamation Act are not disposed of within five years after the passage of this Act, then all of said lands so withdrawn shall be disposed of as other lands provided for in this Act. That the lands not withdrawn for irrigation under said reclamation Act, which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the homestead, town-site, and mineral land laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry

thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided*, That as to the lands open under such proclamation the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *And provided further*, That the price of said lands shall be four dollars per acre, when entered under the homestead laws, to be paid as follows:

“One dollar per acre when entry is made, and the remainder in four equal annual installments, the first to be paid at the end of the second year.

“In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre.

“Lands entered under the town-site and mineral-land laws shall be paid for in amount and manner as provided by said

laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws, and in case any entryman fails to make such deferred payments, or any of them, promptly when due, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be held for cancellation and canceled: *Provided*, That the lands embraced within such canceled entry shall, after cancellation of such entry, be subject to entry under the provisions of the homestead law at four dollars per acre until otherwise directed by the President, as herein provided: *And provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made, except as to lands entered under said reclamation Act: *And provided further*, That when, in the judgment of the President, no more of the land herein ceded can be disposed of at said price, he may by proclamation, to be repeated at his discretion, sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with

such restrictions, and upon such terms as he may deem best for all the interests concerned.”

Section 8 provides as follows:

“That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.”

It is contended on the part of the Government, and this contention is sustained by this court in the decision heretofore rendered, that the land in question is held in trust by the government until the title passes from the government, as provided for by Section 5 *supra*, and that until the title so passes from the Government, the Indian Department can exercise jurisdiction over same.

Before the passage of the Act disposing of this land, the title to same was in the Government, with the right to the possession of same vested in the Crow Indians.

Beecher v. Wetherby, 95 U. S. 517;
Spaulding v. Chandler, 160 U. S. 394.

Such right of occupancy can be terminated by Act of Congress.

Lone Wolf v. Hitchcock, 187 U. S. 553.

The Act of 1904, we contend, equally with the original agreement, provided for the ending of the Indian occupancy. As expressive of such purpose we might refer to the following articles found in the original agreement and embodied in the Act of Congress modifying and amending portions of the original agreement:

Article 3:

“All lands upon that portion of the Reservation hereby granted, ceded and relinquished, which have, prior to the date of this agreement been allotted in severalty to Indians of the Crow tribe shall be reserved for said Indians, or where any Indians have homes on such lands they shall not be removed therefrom without their consent, and those not allotted may receive allotments on the lands they now occupy. But in case any prefer to move they may select land elsewhere on that portion of said Reservation not hereby ceded granted or relinquished, and not occupied by any other Indians, and should they decide not to move their improvements, then the same may be sold for their benefit, said sale to be approved by the Secretary of the Interior, and the cash proceeds shall be paid to the Indian or Indians whose improvement shall be so sold.”

Article 4:

“That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this agreement shall, when necessary be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States.”

And Section 4 of the Act under consideration, after providing for allotments in pursuance of Article 3, contains the following:

“The Secretary of the Interior shall fix a reasonable time within which such Indian occupants shall elect whether they will remain on the ceded tract or remove to the diminished reservation, and where they elect to remove, he shall also fix a reasonable time within which such occupants must remove their improvements if they should choose to do so instead of having the same appraised and sold.”

33 Stat. at Large, 360.

To summarize the situation as to the condition of the land, we find it to be as follows:

The school sections belonged to the State of Montana through the purchase price of same being paid by the United States. The balance of the land was subject to withdrawal and disposition under the Reclamation Act, and if the lands thus withdrawn were not disposed of within five years,

then they were subject to disposal under the homestead, townsite and mineral laws with the restriction that four dollars per acre should be paid for them, and that they should be open to and subject to entry under these laws by proclamation of the President. This proclamation was made May 24, 1906, and since then a portion of the land has been taken by virtue of such proclamation and in compliance with its requirements, and the undisposed of portion, the Indian Department, with the sanction of the Secretary of the Interior, is seeking to exercise jurisdiction over by granting grazing privileges thereon for a price.

It will be noticed that the language of the Act is unqualified and unconditional. By it, the Indians cede, grant and relinquish to the United States all right, title and interest to the land. The United States undertakes to pay for the school sections to which the State of Montana gets title, and for the balance of the land it undertakes to pay over to the Indians four dollars an acre when the same is disposed of by it, and it undertakes to dispose of it by making applicable to it the homestead law, the townsite law and the mineral entry law with the limitation imposed that those acquiring title to the land should pay therefor the sum of four dollars per acre; this sum to be turned over to the Indians. We submit, as stated by Judge Gilbert in his dissenting opinion in this case (221 Federal 588) that the trust which the law created

extends only to the proceeds from the sale of the land, citing

United States v. Choctaw Nation, 179 U. S. 494,

and that the Act in question opened the land to settlement under the general land laws of the United States.

Bean v. Morris, 159 Fed. 651.

This court has declared, in order to make lands public lands, that it is not necessary they should be open to settlement under all the land laws of the United States.

United States v. Blendaure, 128 Fed. 910.

And there is nothing in the case of

Newhall v. Sangar, 92 U. S. 761,
holding to the contrary.

If these lands are open to exploration and settlement they are not reserved. The exercise of jurisdiction over them by the Indian Department through a leasing of same is incompatible with their being explored and settled upon under the homestead, townsite and mineral entry laws of the United States. By the proclamation of the President, the entryman is invited to go upon the land. His doing so is prevented by the land being leased by the Indian Bureau. The mineral entryman's right is not qualified by the condition that his going upon the land is dependent upon its not being leased to some person by the Indian Bureau. This is equally true as to the townsite claimant and the homestead entryman.

The construction given to this law in the decision rendered produces interminable complications and difficulties and leads to absurd results.

We respectfully submit that the decision heretofore made in this case should be reversed and that the judgment of the trial court should be ordered annulled and the action should be ordered dismissed.

Respectfully submitted,

C. B. NOLAN,

WM. SCALLON,

Attorneys for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED

FEB 5 - 1918

F. D. MONOKTON,
CLERK.

BURTON K. WHEELER,
United States Attorney.
HOMER G. MURPHY,
Assistant U. S. Attorney.
JAMES H. BALDWIN,
Assistant U. S. Attorney.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

ARGUMENT.

In reply to the brief of appellant herein, we respectfully submit that it should be disregarded or the argument set forth therein confined solely to the question which is raised by the first specification of error assigned by appellant in prefacing its argument. The merest glance at the brief of appellant herein will disclose to the court that, after a brief statement of the case, appellant proceeds to set forth what are designated "Specifications of Error" (Appellant's Brief p. 4) which specifications do not in any manner resemble the assignments of error filed with the petition for an

appeal herein, save and except it might be said that the first of appellant's "Specifications of Error" possibly is based upon Assignments of Error numbered "I" (Tr. p. 34).

Counsel for appellant having abandoned Assignments of Error numbered II to VII, both inclusive (Tr. pp. 34-35), cannot substitute in place of the same questions not contained in his specific assignments. It might be contended that "Specifications of Error" (Appellant's Brief p. 4) are merely an elaboration of the Assignments in the brief. The rules of this court and the decisions of the various Circuit Courts of Appeal are unanimous in holding that error not assigned cannot be urged on appeal, and will be disregarded.

Rules of Court 11 and 24;

Walton vs. Wild Goose M. Co., 123 Fed. 209, 211;

Stillwagon vs. B. & O. R. Co., 159 Fed. 97;

Russel vs. Bank, 162 Fed. 868, 871.

The error complained of in "Specifications of Error" numbered "I" (Appellant's Brief p. 4) is the only possible question that can be considered herein. There can be no possible combination of any of the Assignments of Error in the record which can be said to cover or in any manner include the specifications in the brief numbered "II" to "V," both inclusive, and a general assignment cannot be invoked to bring a specific point up for consideration on appeal.

City of Findlay vs. Pertz, 74 Fed. 681, 685.

The only real question before us to be argued

and determined on this appeal is did the lower court err in rendering and entering a decree herein in favor of the United States and against the appellant (defendant).

It is to be remembered that this case was once before this court on an appeal taken by the United States from a decree rendered in favor of the Ash Sheep Company, and in that former appeal all the questions attempted to be raised by appellant herein were gone into by counsel for the respective parties, considered by this court and decided in favor of the United States. The decision of this court is to be found in

United States vs. Ash Sheep Company, 221
Fed. 582.

That decision is the law of the case and governs and controls this court, the same as it did the District Court of the United States for Montana, and will until such time, if ever, the same might possibly be reversed by the Supreme Court of the United States, but until such time arrives all are bound by it. Counsel for appellant confess their doubts of the propriety of raising these questions again in this court and apologize for so doing on page five of appellant's brief. We submit that the language used by the Circuit Court of Appeals for the Seventh Circuit states the rule which governs in such questions better than any words of our own.

"To solve the questions presented by the remaining assignments it is necessary to un-

derstand the former decisions in this cause; for it is a familiar and entirely righteous rule that a court of review is precluded from agitating the questions that were made, considered and decided on previous reviews. The former decision furnishes 'the law of the case' not only to the tribunal to which the cause is rendered, but to the appellate tribunal itself on a subsequent writ of appeal. *Roberts v. Cooper*, 20 How. 467, 481, 15 L. Ed. 969: 'There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticism on its opinions, or speculate of chances from changes in its members'."

Standard Sewing Machine Co. vs. Leslie,
118 Fed. 557, 559;

See also:

Supervisors vs. Kennicott, 94 U. S. 499;
Tyler vs. Magwire, 17 Wall. 284;
Stewart vs. Salomon, 94 U. S. 363;
Oregon etc. N. Co. vs. Balfour, 90 Fed. 301.

In the case at bar we have a record identical with that in the former appeal, save and except the lower court in obedience to the mandate of this court entered the decree it was ordered to.

We submit the decree appealed from should be affirmed.

BURTON K. WHEELER,
United States Attorney.

JAMES H. BALDWIN,
HOMER G. MURPHY,

Assistant U. S. Attorneys, District of Montana.



